Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD ROE, representing unknown employees of the Philadelphia District Attorney's Office,
Petitioner

v.

RAYMOND CARTER,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the analysis set forth by this Court in McMillian v. Monroe County, 117 S. Ct. 1734 (1997), to determine whether a governmental entity is state or local for purposes of federal civil liability, controlling of the determination of an entity's state or local status pursuant to the Eleventh Amendment?

Is policymaking within a District Attorney's Office concerning prosecutorial functions itself a prosecutorial function?

PARTIES TO THE PROCEEDING

The petitioner is:

Richard Roe, representing unknown employees of the Philadelphia District Attorney's Office[1]

The respondent is:

Raymond Carter

Amicus curiae briefs were submitted in the United States Court of Appeals for the Third Circuit on behalf of the District Attorney's Office, by:

Commonwealth of Pennsylvania, Office of Attorney General (joined in by the Honorable Thomas J. Ridge, Governor of the Commonwealth of Pennsylvania)

Pennsylvania District Attorneys Association (joined in by the Honorable Thomas J. Ridge, Governor of the Commonwealth of Pennsylvania)

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[1] Petitioner Richard Roe, representing unknown employees of the Philadelphia District Attorney's Office, will be referred to herein as the "District Attorney's Office."

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The April 28, 1999, judgment and opinion of the United States Court of Appeals for the Third Circuit, reversing the order of the district court, is reported at 181 F.3d 339 (3d Cir. 1999), and is reprinted in the Appendix at App. 1-46. The modifications made by the court to this opinion and set forth in correspondence dated May 7, 1999, and May 14, 1999, are reprinted in the Appendix at App. 47-50 and App. 51-53, respectively. The July 15, 1999, order of the Third Circuit, granting the motion of the District Attorney's Office to stay the mandate pending the filing of a petition for writ of certiorari and staying the mandate until August 24, 1999, is reprinted in the Appendix at App. 54-55. The August 11, 1999, order of the Third Circuit, granting the motion of the District Attorney's Office to extend the stay of the mandate until September 17, 1999, is reprinted in the Appendix at App. 56. The June 18, 1999, order of the Third Circuit, denying the Petition for Rehearing and Rehearing En Banc of the District Attorney's Office, is reprinted in the Appendix at App. 57-58. The April 20, 1998, order and opinion of the district court, granting the District Attorney's Office's Motion to Dismiss and dismissing all claims against the Office, is reported at 4 F.Supp.2d 386 (E.D. Pa. 1998), and is reprinted in the Appendix at App. 59-82.

STATEMENT OF JURISDICTION

Petitioner seeks review of the April 28, 1999, order of the United States Court of Appeals for the Third Circuit, reversing the April 20, 1998, judgment of the United States District Court for the Eastern District of Pennsylvania dismissing respondent Carter's Complaint as to the District Attorney's Office. Jurisdiction of this Court to review the

judgment of the Third Circuit is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

On July 9, 1997, respondent filed a Complaint in the United States District Court for the Eastern District of Pennsylvania, alleging that his civil rights were violated in connection with his conviction for murder and subsequent

imprisonment. On September 26, 1997, respondent filed a First Amended Complaint (hereinafter, "Complaint"). Prior to commencing his civil action, respondent's underlying criminal conviction was vacated by a judge of the Philadelphia Court of Common Pleas because respondent had not been informed that the eyewitness who identified him as the murderer had received money from a police detective. The Court of Common Pleas concluded that the District Attorney's Office was not aware that the witness had been paid and did not conclude that respondent was, in fact, innocent of the murder for which he was convicted.[2]

Respondent brought suit against, inter alia, the City of Philadelphia and the District Attorney's Office, and alleged that his conviction was "caused by ... policies, practices, customs or usages of the City as adopted by its duly authorized agents." The District Attorney's Office moved to dismiss respondent's Complaint. The District Attorney's Office asserted that, in carrying out its law enforcement responsibilities, it was a Commonwealth entity and, thus, not subject to suit in federal court, pursuant to the Eleventh Amendment. Moreover, the District Attorney's Office argued that, regardless of the District Attorney's Office's status as a state or local entity, respondent's Complaint failed to state adequately any claim based upon policy. In addition, the District Attorney's Office asserted that the common law doctrine of absolute prosecutorial immunity applied to respondent's individual capacity claim.

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[2] In fact, on March 16, 1999, during discovery in this case, a witness was deposed by defendant City of Philadelphia who stated that respondent, on multiple occasions, confessed to her that he did, in fact, commit the murder. The information provided by this witness was not known at the time of respondent's criminal trial or the post-trial proceedings in the Court of Common Pleas.

On April 20, 1998, the district court granted the District Attorney's Office's Motion to Dismiss. The district court concluded that, "when performing its investigatory and prosecutorial functions, the District Attorney's Office is an arm of the State protected from suit in federal court by the Eleventh Amendment." 4 F.Supp.2d at 387 (App. 63). The district court also determined that the development of policy regarding prosecution was no less a prosecutorial function than acts taken pursuant to such policy and, thus, held that the District Attorney's Office was a state entity entitled to Eleventh Amendment immunity "regardless of whether the District Attorney's Office is prosecuting cases or developing policies to govern such prosecutions . . ." 4 F.Supp.2d at 393 (App. 77). Finally, the district court concluded that respondent failed to state any individual capacity supervisory liability claim against the District Attorney's Office, and, thus, dismissed respondent's individual capacity claim as well.

On April 28, 1999, after briefing and oral argument,[3] the dismissal of respondent's Complaint as to the District

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[3] Amicus curiae briefs were submitted on behalf of the District Attorney's Office by the Attorney General of Pennsylvania and the Pennsylvania District Attorney's Association. The Governor of Pennsylvania joined in these amicus briefs. The correspondence from the Governor to the Third Circuit joining in the amicus briefs is reprinted in the Appendix at App. 83-84. All of these submissions asserted that the District Attorney's Office was a state entity with respect to its prosecutorial responsibilities and was, thus, entitled to Eleventh Amendment immunity. Similarly, the City of Philadelphia joined in the position of the District Attorney's Office that the Office was a state entity entitled to the protections of the Eleventh Amendment. The correspondence

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Attorney's Office was reversed by a panel of the United States Court of Appeals for the Third Circuit. The panel concluded that -- contrary to the position of both the Governor of Pennsylvania and the Mayor of Philadelphia -- the District Attorney's Office was not a Commonwealth entity entitled to Eleventh Amendment immunity from suit. Furthermore, the court characterized the development of policies concerning prosecution as "managerial," and not prosecutorial. Similarly, the court concluded that common law absolute prosecutorial immunity did not bar respondent's individual capacity claim as the functions at issue were administrative and not prosecutorial.[4]

In reaching its decision, the Third Circuit ignored this Court's decision in McMillian v. Monroe County, 117 S.Ct. 1734 (1997), establishing binding standards for determining whether officials are "state" or "local" for purposes of federal civil liability. In fact, while the District Attorney's Office's submissions to the Third Circuit repeatedly discussed the relevance of McMillian to the court's determination, the Third Circuit never mentioned McMillian in rendering its decision. The Third Circuit's decision further erred in characterizing the functions at issue in respondent's Complaint as administrative or managerial, rather than prosecutorial, and

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from the City of Philadelphia to the Third Circuit joining in the position of the District Attorney's Office is reprinted in the Appendix at App. 85-86.

[4] The panel characterized the District Attorney's Office's absolute immunity argument as an alternative basis for dismissal of respondent's official capacity claim. In fact, the absolute immunity argument was made in support of the dismissal of respondent's individual capacity claim.

in concluding that a plaintiff could, thus, avoid application of both Eleventh Amendment and common law prosecutorial immunity by summarily asserting that conduct was undertaken pursuant to "policy."

On May 12, 1999, the District Attorney's Office filed a Petition for Rehearing and Rehearing En Banc in response to the Third Circuit's decision. The District Attorney's Office based its Petition, in large part, on the Third Circuit's failure to follow McMillian. Nonetheless, although the court did issue modifications to its decision in other respects, the court never addressed its failure to acknowledge, much less apply, McMillian. The Third Circuit denied the District Attorney's Office's Petition on June 18, 1999.

Thereafter, on June 25, 1999, the District Attorney's Office filed a motion to stay the issuance of the Third Circuit's mandate pending the filing of this Petition for Writ of Certiorari. On June 30, 1999, respondent filed an Answer to the motion to stay the issuance of the mandate. On July 15, 1999, the Third Circuit granted the District Attorney's Office's motion to stay issuance of the mandate and stayed the issuance of its mandate until August 24, 1999.

On July 23, 1999, the District Attorney's Office filed a Motion to Extend the Stay of Mandate to September 17, 1999, which the court granted on August 11, 1999.

The Third Circuit erred in failing to apply the analysis set forth in McMillian to this case. In its apparent conclusion that the McMillian analysis is inapplicable to the determination of an entity's state status for purposes of the Eleventh Amendment, the Third Circuit's decision conflicts with the Seventh Circuit and numerous district court rulings, which have applied the McMillian analysis to the

determination of an entity's state status under the Eleventh Amendment.[5]

As a consequence of its failure to apply the McMillian analysis, the Third Circuit rendered a decision which is entirely inconsistent with McMillian and which additionally conflicts with the pre- and post-McMillian decisions of other circuits, determining that District Attorney's Offices are state entities, immune from suit pursuant to the Eleventh Amendment.

In addition, the Third Circuit has also placed itself in conflict with at least two other circuits with its conclusion that the development and promulgation of policies concerning the discharge of the District Attorney's Office's law enforcement responsibilities are administrative, and not prosecutorial, functions. The Third Circuit's determination in this regard, in concert with its conclusion that a claim for

[5] The Third Circuit's decision is in agreement with that of the Fifth Circuit, which has also rejected the McMillian analysis in the Eleventh Amendment context and concluded that the determination of an entity's status for purposes of the Eleventh Amendment is distinct from the determination of an entity's status for purposes of federal civil rights liability pursuant to section 1983. The case in which the Fifth Circuit rejected the applicability of McMillian in the Eleventh Amendment context is Hudson v. City of New Orleans, 174 F.3d 677 (5th Cir. 1999). The Orleans Parish District Attorney's Office petitioned unsuccessfully for rehearing en banc in this case. The Orleans Parish District Attorney's Office's petition for writ of certiorari to this Court was due on September 15, 1999, and it is the understanding of petitioner here that the Orleans Parish District Attorney's Office did file a petition for writ of certiorari seeking this Court's consideration of the issue of the applicability of McMillian to the determination of an entity's state or local status pursuant to the Eleventh Amendment.

municipal liability can be alleged merely by the invocation of the word "policy,"[6] thus enables plaintiffs to circumvent Eleventh Amendment and common law immunity by characterizing allegedly injurious conduct as the result of a policy or the absence of one.

For these reasons, petitioner seeks this Court's review.

REASONS FOR GRANTING THE WRIT

The analysis set forth by this Court in McMillian v. Monroe County to determine whether a governmental entity is state or local for purposes of federal civil liability controls the determination of an entity's state or local status pursuant to the Eleventh Amendment. The Third Circuit's rejection of McMillian in Eleventh Amendment cases creates a circuit split and erroneously establishes two separate tests for determining state status for purposes of federal civil liability.

In reaching its conclusion that the District Attorney's Office was not a state entity entitled to Eleventh Amendment immunity,[7] the Third Circuit failed to follow (and, in fact, did

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[6] This conclusion does not comport with the Federal Rules of Civil Procedure and is itself in conflict with the decision of at least one other circuit.

[7] The phrase "Eleventh Amendment immunity" refers to the sovereign immunity possessed by state entities. As this Court has

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not even acknowledge the existence of) this Court's decision in McMillian v. Monroe County, 117 S. Ct. 1734 (1997), which established binding standards for determining whether officials are "state" or "local" for purposes of federal civil liability. In rejecting McMillian in the Eleventh Amendment context, the Third Circuit has rendered a decision which conflicts with the law of this Court, and has exacerbated the conflict among the circuits concerning McMillian's applicability to the determination of an entity's state status for purposes of federal civil liability.

Furthermore, the Third Circuit's conclusion that the District Attorney's Office is a local entity conflicts with the conclusion of this Court in McMillian, in addition to the decisions of other circuits, which have determined that District Attorney's Offices are state entities. The Third Circuit's decision will encourage a flood of civil suits against prosecutors for trying to carry out their delegated state functions, abrogating the sovereignty of the Commonwealth of Pennsylvania, in whose name prosecutors act in performing their sworn duties.

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recently noted in discussing the foundations and scope of immunity accorded to state entities, "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." Alden v. Maine, 119 S. Ct. 2240, 2246 (1999) (5-4 decision).

Pennsylvania has not waived its sovereign immunity from suit in federal court. 42 Pa.C.S.A. §8521(b); Laskaris v. Thornburgh, 661 F.2d 23 (3d Cir. 1981), cert. denied, 105 S. Ct. 260 (1984).

In McMillian, this Court held that a Sheriff in Alabama -- an official essentially identical in all relevant respects to the District Attorney here -- was a state official for purposes of section 1983. Given that the Sheriff was a state, and not municipal, policymaker, the Sheriff's conduct could not subject the municipality within which the Sheriff exercised his jurisdiction to municipal liability pursuant to Monell v. New York City Dep't of Social Servs., 98 S. Ct. 2018 (1978). In determining that the Monroe County Sheriff acted for the state in the exercise of his law enforcement responsibilities, this Court established the governing framework by which an entity's state or local status is to be judged. Application of that framework to the present case results in the conclusion that the District Attorney's Office is a state entity.

However, although the Third Circuit was called upon to determine the status of the District Attorney's Office as a state or local entity, the court ignored McMillian altogether. The court, thus, neither applied McMillian nor explained why it did not consider itself bound to apply McMillian. Presumably, however, the court would have attempted to justify its failure to follow McMillian on the basis that McMillian pertains to the determination of an entity's local or state status for purposes of section 1983 municipal liability and not to the determination of whether an entity is entitled to Eleventh Amendment immunity. However, this purported distinction is illusory, as both of these issues turn precisely on the same question: namely, whether a government entity is characterized as state or local. See Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989) (an "arm of the state" for purposes of Eleventh Amendment immunity cannot be a "person" subject to suit under section 1983). See also Howlett v. Rose, 110 S. Ct. 2430, 2437 (1990)(Will held that "an entity with Eleventh Amendment immunity is not a 'person'

within the meaning of §1983"). The McMillian analysis, thus, cannot be dismissed in the consideration of whether an entity is state or local for purposes of the Eleventh Amendment.[8]

Despite the relevance of the McMillian analysis to the determination of an entity's state or local status generally, disagreement has arisen in the circuits as to the applicability of the McMillian analysis in the Eleventh Amendment context. In Franklin v. Zaruba, 150 F.3d 682 (7th Cir. 1998), the Seventh Circuit was faced with the question of whether an Illinois sheriff was a state actor and, thus, entitled to Eleventh Amendment immunity. In answering this question in the negative, the court applied the analysis set forth in

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[8] Indeed, in prior cases, the Third Circuit itself has recognized the connection between an entity's amenability to suit pursuant to section 1983 and an entity's status with respect to the Eleventh Amendment. The court has previously observed that whether a defendant is a state entity, and therefore not a "person" subject to suit pursuant to section 1983, is not an independent question from whether an entity is a state entity entitled to Eleventh Amendment immunity. Bolden v. Southeastern Pennsylvania Trans. Auth., 953 F.2d 807 (3d Cir. 1991)(in banc)(relying on Will), cert. denied, 112 S. Ct. 2281 (1992). Thus, the determination of an entity's state status for purposes of section 1983 does not exist independently of the determination of that entity's state status for purposes of the Eleventh Amendment. See also Kovats v. Rutgers, 822 F.2d 1303 (3d Cir. 1987)(determination that entity not entitled to Eleventh Amendment immunity is dispositive of claim that entity not "person" subject to suit pursuant to §1983); Bibbs v. Newman, 997 F.Supp. 1174, 1178 n.1 (S.D. Ind. 1998)(whether individual is a state official entitled to Eleventh Amendment immunity and whether individual is a state official and, thus, not a "person" pursuant to section 1983 involve "identical" analysis).

McMillian. See also Bibbs v. Newman, 997 F.Supp. 1174 (S.D. Ind. 1998)(court applies McMillian to answer Eleventh Amendment question); Hawkins v. Comparet-Cassani, Case No. CV 98-5605 DDP (CWx), 1999 U.S. Dist. LEXIS 4473 (C.D. Ca. February 3, 1999) (same); Abraham v. Piechowski, 13 F. Supp. 2d 870 (E.D. Wis. 1998)(same); Aleman v. Milwaukee County, 35 F. Supp. 2d 710 (E.D. Wis. 1999) (same); Granville v. Plummer, No. C97-3513 MHP, 1999 U.S. Dist. LEXIS 1395 (N.D. Ca. February 8, 1999)(same); DeGenova v. Sheriff of DuPage County, 18 F. Supp. 2d 848 (N.D. Ill. 1998) (same).

The Fifth Circuit, on the other hand, has expressly rejected McMillian as controlling of the determination of whether an entity is state or local for purposes of the Eleventh Amendment. In Hudson v. City of New Orleans, 174 F.3d 677 (5th Cir. 1999), the court was faced with the question of whether a Louisiana District Attorney's Office was a state entity and, thus, immune from suit pursuant to the Eleventh Amendment. The Fifth Circuit, in a footnote, cursorily rejected the District Attorney's Office's argument that McMillian set forth the analysis to be applied in determining that Office's state or local status because McMillian "did not concern the Eleventh Amendment." 174 F.3d at 681 n.1.[9]

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[9] As in the Third Circuit's decision in Carter, the Fifth Circuit's rejection of McMillian in Hudson resulted in its consideration of factors explicitly rejected by this Court in McMillian, see infra at 13, 20-21, as dispositive of an entity's state or local status. See Hudson, 174 F.3d at 690-91 (district attorney is elected locally, and district attorney's jurisdiction is local). Consequently, the Fifth Circuit concluded that the Louisiana District Attorney's Office was not a state entity entitled to Eleventh Amendment immunity.

As a consequence of its failure to apply the McMillian analysis, the Third Circuit rendered a decision contrary to McMillian. Had it applied the McMillian analysis, the Third Circuit would have concluded, correctly, that -- like the Monroe County Sheriff in Alabama -- the District Attorney's Office is a state entity with respect to its law enforcement responsibilities.

Pursuant to McMillian, the determination of an entity's state or local status does not occur in a vacuum without regard to the context in which such determination is to be made. Rather, whether an entity is state or local depends upon a substantive analysis of the entity's status under state law with respect to the particular function of the entity which has been called into question.

The particular function at issue in McMillian was law enforcement. In determining the Sheriff's status with respect to this function, the Court noted that under the law of Alabama "sheriffs are given complete authority to enforce the state criminal law in their counties," and that the governing bodies of the counties had no authority over the manner in which the Sheriffs carried out their law enforcement responsibilities. Id. at 1739.

Significantly, this Court rejected four "important" countervailing factors in concluding that the Sheriff was a state, not municipal, policymaker. Id. at 1740. First, the Sheriff's salary was paid out of the county treasury. Id. Second, the county funded the equipment and operational expenses of the Sheriff. Id. Third, the Sheriff's jurisdiction was limited to the bounds of his own county. Id. Fourth, the Sheriff was elected locally by voters within his own county. Id.

In McMillian, this Court established that "whether [the Sheriff] represents the State or the county when he acts in a law enforcement capacity .... is dependent on an analysis of state law." Id. at 1737. This analysis is governed not by the labels attached to the position but rather by a substantive analysis of whether the function in question is considered to be a state or local duty as a matter of state law. Id.; see also id. at 1740 n.7 (Court rejects Alabama Code's designation of Sheriff as "county official" and "county employee" as determinative of Sheriff's status).

Pennsylvania law is clear that with respect to its law enforcement responsibilities, the District Attorney's Office is a state entity. Indeed, as the submissions of the Governor of Pennsylvania, the Attorney General of Pennsylvania, and the City of Philadelphia to the Third Circuit in this case make clear, the Commonwealth of Pennsylvania and the City of Philadelphia agree that the District Attorney's Office is a state entity with respect to its law enforcement responsibilities.

In Pennsylvania, district attorneys are the successors to the powers held by state deputy attorneys general, who were appointed and supervised by the Attorney General. Before 1850, the Attorney General had the duty of investigating and prosecuting crimes, and "in practice he delegated this duty by appointing deputy attorneys general for the several counties." Commonwealth ex rel. Specter v. Bauer, 261 A.2d 573, 575 (Pa. 1970)(citing Commonwealth ex rel. Specter v. Freed, 228 A.2d 382, 383-84 (Pa. 1967)(plurality opinion)); Commonwealth v. Lehman, 164 A. 526, 528 (Pa. 1932). In 1850, the General Assembly "enacted legislation transferring the duties performed by such appointed deputy attorneys general to an official elected by the voters of the county and designated 'district attorney.'" Freed, 228 A.2d at

384; Lehman, 164 A. at 528. The successor to that statute, as now written, provides:

> The district attorney shall sign all bills of indictment and conduct in court all criminal and other prosecutions, in the name of the Commonwealth, or, when the Commonwealth is a party, which arise in the county for which he is elected, and perform all the duties which, prior to May 3, 1850, were performed by deputy attorneys general.

16 Pa.C.S.A. §1402(a); see Bauer, 261 A.2d at 576 (District Attorney has "historical duty of representing the Commonwealth's interest in the enforcement of its criminal laws").[10]

The Pennsylvania Supreme Court has explained that, "[i]f this statute means anything at all, it means district

[10] The court's opinion in Freed, referring to this language, noted:

> It would seem clear from this language that the only significant change accomplished by the Act of 1850 was the alteration in the manner of selecting officers to enforce state criminal laws and to act as the state's legal representative in each county. There can be no doubt, especially in light of the decisions of this Court that the Attorney General of the Commonwealth may supersede any district attorney, that the essentially state-character of criminal law enforcement was not affected.

228 A.2d at 384 (emphasis in original).

attorneys in this Commonwealth have the power -- and the duty -- to represent the Commonwealth's interests in the enforcement of its criminal laws." Bauer, 261 A.2d at 575. See also id. (equating "the state" with "the District Attorney"); Commonwealth v. Anderson, 415 A.2d 887, 888 (Pa. 1980)(District Attorney represents the Commonwealth); Commonwealth ex rel. Specter v. Martin, 232 A.2d 729, 736 (Pa. 1967)(opinion of Jones, O'Brien, & Roberts, JJ.) ("the District Attorney of Philadelphia does not perform any municipal functions and his duties involve only his representation of the Commonwealth . . . . [T]he duties of the district attorney are performed on behalf of the Commonwealth").[11]

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[11] The status of the District Attorney's Office as state or local may vary depending on the function that the Office is carrying out. See Sprague v. Fitzpatrick, 412 F.Supp. 910, 913 n.8 (E.D. Pa.), aff'd, 546 F.2d 560 (3d Cir. 1976), cert. denied, 431 U.S. 937 (1977); Coleman v. Kaye, 87 F.3d 1491 (3d Cir. 1996), cert. denied, 519 U.S. 1084 (1997). For example, the Office might not be deemed to act on behalf of the state with respect to the procurement of office equipment. However, Pennsylvania law is clear that the District Attorney's Office is an arm of the Commonwealth with respect to its law enforcement responsibilities. Indeed, the Pennsylvania Supreme Court in Commonwealth ex rel. Specter v. Bauer emphasized:

> [In this case] it is easy [to resolve the question of the status of the District Attorney's Office as a state or local entity], for we today are faced with a direct challenge to the District Attorney's basic function -- enforcement of the Commonwealth's penal statutes.

Commonwealth ex rel. Specter v. Bauer, 261 A.2d at 575 (holding that District Attorney's Office is a state entity).

Just as the Sheriff in McMillian was the chief law enforcement officer of the state within his county, so too are district attorneys in Pennsylvania defined in the Commonwealth Attorneys Act as "the chief law enforcement officer for the county in which he [or she] is elected." Commonwealth Attorneys Act, 71 Pa.C.S.A. §732-101 et seq., §732-206(a). See also In re Piscanio Appeal, 344 A.2d 658, 660 (Pa. Super. Ct. 1975)(district attorney acts "[i]n the capacity as the Commonwealth's attorney ... fulfill[ing] the obligation of investigation and prosecution of crime"); Commonwealth v. Mejia-Arias, No. 1754 Philadelphia 1997, 1999 Pa. Super. LEXIS 1838, *8 (Pa. Super. Ct. June 14, 1999)(noting that the District Attorney is the Commonwealth); Pa.R.Crim.P. 225, 313 (referring to district attorney as "attorney for the Commonwealth").[12]

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[12] The fact that the District Attorney is designated as a local officer in the Pennsylvania Constitution does not alter the Office's status as a state entity with respect to its law enforcement responsibilities. The designation of the District Attorney in the Pennsylvania Constitution is "concerned solely with the election and compensation" of the district attorney and "[n]ot one word of the article as originally written concerns the functions or duties of district attorney ...." Freed, 228 A.2d at 384. See also id. at 385 (the District Attorney's "functions, powers and duties were never those of 'county government'"). The Freed court's recognition that the Pennsylvania Constitution does not render the District Attorney's Office a local entity with respect to its prosecutorial responsibilities was similarly reiterated by the district court judge in this case, himself a former Justice of the Pennsylvania Supreme Court. As the district court noted, the language of the Pennsylvania Constitution "does not in any way affect the district attorney's function of investigating and prosecuting crimes in the name of the Commonwealth." 4 F. Supp. 2d at 392 n.8 (App. 74 n.8) (referring to the language of Article IX, §4 of the Pennsylvania Constitution

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In McMillian, this Court found significant the Sheriff's independence from local control. As with the Sheriff, the District Attorney's Office exercises its law enforcement responsibilities on behalf of the Commonwealth independent from any control by the Mayor of Philadelphia, Philadelphia City Council, or other entity of local government. The District Attorney's Office's independence from local control, in fact, is a trait which the Pennsylvania Supreme Court has explicitly emphasized and sought to protect. In Bauer, for example, the Pennsylvania Supreme Court stated:

> The District Attorney of Philadelphia County, no less than district attorneys in any other county of this Commonwealth, is the sole public official charged with the legal responsibility of conducting "in court all criminal and other prosecutions, in the name of the Commonwealth." Act of July 5, 1957, supra. The District Attorney must be allowed to carry out this important function without hindrance or interference from any source.

261 A.2d at 576. See also Harris v. Pernsley, 820 F.2d 592, 598-99 (3d Cir. 1987), cert. denied, 108 S. Ct. 336 (1987); Commonwealth ex rel. Specter v. Freed, supra, at 383 ("...we believe that neither the Constitution nor the statutes of this

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(formerly set forth in Article XIV, §1 of the Pennsylvania Constitution and revised as set forth in Article IX, §13 of the Pennsylvania Constitution (abolishing county offices in Philadelphia and replacing county officers with city officers in Philadelphia)). See also McMillian, 117 S. Ct. at 1740 n.7 (Court rejects designation of Sheriff as "county official" and "county employee" in Alabama Code as determinative of Sheriff's status).

Commonwealth have ever granted Philadelphia or any other political subdivision of Pennsylvania authority to alter or interfere with the district attorney's conduct of law enforcement activities"); Commonwealth v. Stipetich, 652 A.2d 1294, 1295 (Pa. 1995).[13]

[13] In fact, the only relevant controls on the District Attorney's Office are state-imposed. See, e.g., 71 Pa.C.S.A. §732-205(a)(4) (Attorney General may petition to supersede the District Attorney's prosecution of a case); Pa.Const., Art. VI, §§4-7, 16 Pa.C.S.A. §450, 16 Pa.C.S.A. §§1405-1406, 16 Pa. C.S.A. §§4405-4406 (District Attorney may be removed by impeachment through the House of Representatives, the Governor (on the advice of the Senate), or through prosecution in state court); 16 Pa.C.S.A. §11011-5.1(a) (setting salary of District Attorney ($1,000 less than compensation paid to state court judge)); 16 Pa.C.S.A. §§7708-7709 (local government required by state law to pay the expenses of the District Attorney's Office in investigating and prosecuting crime). See also Lehman, 164 A. at 527 ("[T]he Legislature may regulate the performance of the duties of the [district attorney's] office and provide for cases in which it would be improper for the elected officer to act"); accord Commonwealth v. McHale, 97 Pa. 397, 406 (1881) (the "legislature . . . can control the [district attorney]"); In re Shelley, 2 A.2d 809, 812 (Pa. 1938).

Nonetheless, the Third Circuit considered the District Attorney's Office's degree of autonomy from the Commonwealth virtually exclusively in terms of the Office's interrelation with the state Attorney General. Since the Pennsylvania Legislature has chosen to give the Attorney General only very limited control over district attorneys, the Third Circuit concluded that District Attorneys are autonomous from the state, and therefore not entitled to Eleventh Amendment immunity.

This logic completely misses the point of Eleventh

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The Third Circuit's ignorance of this Court's analysis in McMillian is apparent not only in the weight which the Third Circuit failed to give to Pennsylvania law -- which clearly holds that the District Attorney's Office is a state entity with respect to the exercise of its law enforcement responsibilities -- but also in the weight which the Third Circuit did give to factors explicitly rejected by this Court as determinative of the state or local status question in McMillian. As previously noted, the Sheriff's salary was paid out of the county treasury, and the county funded the equipment and operational expenses of the Sheriff. The Third Circuit explicitly noted that the District Attorney's Office was locally funded in concluding that the District Attorney's Office was not a state entity -- contrary to McMillian. In addition, in McMillian, the Sheriff's jurisdiction was not statewide, but rather, was limited to his own county. The Third Circuit relied upon this factor to support its conclusion that the District Attorney's Office was a local entity -- contrary to McMillian. Finally, the Sheriff was elected locally by voters within his own county. Again, although local election of the Sheriff

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Amendment analysis. It is not the state Attorney General who is the ultimate source of the District Attorney's duties and authority, but the State Legislature, which created both offices and divides responsibilities between them as it sees fit. See Commonwealth Attorneys Act, 71 Pa.C.S.A. §732-101 et seq.

Nor does it matter whether the Legislature has chosen to impose extensive restraints on the District Attorney's day-to-day exercise of delegated authority. The point is that only the Legislature has the power to set the scope of the District Attorney's powers; no local government entity can purport to control a District Attorney's exercise of authority. Thus, exactly as in McMillian, the District Attorney's Office is independent of local control.

was rejected by this Court as dispositive of the Sheriff's status, the Third Circuit cited this characteristic of the District Attorney's Office in concluding that the District Attorney's Office was a local entity -- contrary to McMillian. In short, the Third Circuit in this case credited the very factors that this Court found not to be dispositive of the determination of the Sheriff's status as a state officer in McMillian.

The Third Circuit, in failing to follow the controlling analysis set forth in McMillian, rendered a decision which conflicts not only with Supreme Court precedent but also with the decisions of other circuits which have held that District Attorneys are state officers entitled to Eleventh Amendment immunity.[14] See, e.g., Owens v. Fulton County, 877 F.2d 947 (11th Cir. 1989); Rodriguez v. Weprin, 116 F.3d 62 (2d Cir. 1997);[15] Osborn v. Miller, No. 97-5470, 1998 U.S. App. LEXIS 1682 (6th Cir. Feb. 2, 1998)(opinion not recommended for full-text publication); Garcia v. City of Chicago, 24 F.3d 966 (7th Cir. 1994), cert. denied, 115 S. Ct. 1313

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[14] In McMillian, this Court noted that "district attorneys ... are often considered ... state officials." 117 S. Ct. at 1740.

[15] The state of the law in the Second Circuit concerning the status of District Attorneys is confused. On the one hand, the court has determined that District Attorneys act for the state with respect to the prosecution of criminal cases. Rodriguez v. Weprin, supra; Baez v. Hennessy, 853 F.2d 73 (2d Cir. 1988), cert. denied, 109 S. Ct. 805 (1989). On the other hand, the court has determined that policymaking with respect to the prosecution of cases is a nonprosecutorial act, with respect to which District Attorneys are county actors. Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), cert. denied, 113 S. Ct. 1387, and cert. denied, 113 S. Ct. 1412 (1993); Myers v. County of Orange, 157 F.3d 66 (2d Cir. 1998), cert. denied, 119 S. Ct. 1042 (1999).

(1995); Pusey v. City of Youngstown, 11 F.3d 652 (6th Cir. 1993), cert. denied, 114 S. Ct. 2742 (1994); Arnold v. McClain, 926 F.2d 963 (10th Cir. 1991); Rozek v. Topolnicki, 865 F.2d 1154 (10th Cir. 1989); Chrissy F. v. Mississippi Dep't of Pub. Welfare, 925 F.2d 844 (5th Cir. 1991).[16] But see, e.g., Hudson v. City of New Orleans, 174 F.3d 677 (5th Cir. 1999), discussed supra; Crane v. State of Texas, 766 F.2d 193 (5th Cir.), cert. denied, 106 S. Ct. 570 (1985).

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[16] In fact, even the Third Circuit previously recognized the status of the District Attorney's Office as the criminal law enforcement office of the Commonwealth, although this fact was neglected by the Third Circuit in rendering its decision in Carter. In Harris v. Pernsley, 820 F.2d 592 (3d Cir.), cert. denied, 108 S. Ct. 336 (1987), the Third Circuit considered the appeal of the District Attorney's Office from the district court's denial of its motion to intervene in litigation concerning prison conditions in the Philadelphia Prison System. The Third Circuit upheld the denial of the District Attorney's Office's intervention motion, and, in so doing, emphasized that the District Attorney's Office was responsible for representing the Commonwealth's interests in criminal law enforcement (and was not responsible for management of the prison system -- a local function entrusted to the City). See, e.g., id. at 600 (the District Attorney "is the official who represents the Commonwealth's interests in criminal law enforcement"); id. at 601-02 (court notes the District Attorney's "role as the law enforcement officer of the Commonwealth" and "function as the spokesperson for Pennsylvania's interest in criminal prosecutions....") Cf. Coleman v. Kaye, 87 F.3d 1491, 1499 (3d Cir. 1996)(in New Jersey, "when county prosecutors execute their sworn duties to enforce the law by making use of all the tools lawfully available to them to combat crime, they act as agents of the State"), cert. denied, 519 U.S. 1084 (1997). The Third Circuit's decision in Carter neglected the court's previous opinion in Harris, which recognized the status of the District Attorney's Office as the chief criminal law enforcement officer of the Commonwealth.

Moreover, courts in other jurisdictions, applying reasoning similar to that utilized by this Court in McMillian, have concluded that District Attorneys are state officers even though they possess certain attributes of local officers, e.g., are funded locally. See Esteves v. Brock, 106 F.3d 674, 677-78 (5th Cir.)(although Texas district attorney "primarily has attributes of a county officer, including payment by local funds and election by the voters of the district," district attorney is a state officer with respect to his or her prosecutorial responsibilities), cert. denied, 118 S. Ct. 91 (1997); Pitts v. County of Kern, 949 P.2d 920 (Cal. 1998)(applying McMillian, court concludes that California district attorneys, whose salaries and expenses are paid locally, are, nonetheless, state, not local, officers); Bibbs v. Newman, 997 F.Supp. 1174 (S.D. Ind. 1998)(applying McMillian, court concludes that Indiana prosecuting attorneys, whose operating expenses and salaries (for all but the chief prosecuting attorney and one chief deputy) are funded locally, are nevertheless state officials). See also Owens v. Fulton County, 877 F.2d 947, 952 (11th Cir. 1989)(where "Georgia district attorney's relationship to the county involves merely budgetary and administrative matters," district attorney is state officer with respect to "exercise of discretion in the prosecution of state offenses"). Cf. Franklin v. Zaruba, 150 F.3d 682 (7th Cir. 1998)(court, applying McMillian, concludes that Illinois sheriff is local officer, but recognizes, pursuant to McMillian, that funding does not control the determination of sheriff's state or local status), cert. denied, 119 S. Ct. 1033 (1999); Robinson v. Court of Common Pleas of Philadelphia County, 827 F.Supp. 1210 (E.D. Pa. 1993)(despite local funding, Philadelphia Municipal Court and Court of Common Pleas are state entities entitled to Eleventh Amendment immunity).

In setting forth the analysis for determining whether an entity is state or local, McMillian does implicate the Eleventh Amendment. The Third Circuit, as the Fifth, has erred in failing to recognize McMillian's applicability in this context and in failing to determine that, after application of the McMillian analysis, the District Attorney's Office is a state entity entitled to Eleventh Amendment immunity from suit. The Third Circuit's decision, thus, warrants review by the Supreme Court.

The Third Circuit's decision erroneously characterizes policymaking with respect to prosecutorial responsibilities as a non-prosecutorial function, and, thus, enables plaintiffs to evade the protections of the Eleventh Amendment and common law immunity by summarily claiming that alleged injury was caused pursuant to "policy."

In determining that neither Eleventh Amendment immunity nor common law prosecutorial immunity applied to respondent's claims, the Third Circuit characterized the functions implicated in respondent's Complaint -- specifically, the development of policy regarding the use of informants and evidence, prosecution of police officers, and disclosure of information to defendants -- as managerial or administrative, and not prosecutorial.[17] The Third Circuit

[17] Although respondent's Complaint did not allege that the District Attorney's Office was responsible for training the Philadelphia Police Department, the Third Circuit stated that respondent could maintain an action against the District Attorney's Office based upon policies regarding the training of police offi-

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thereby authorized the circumvention of Eleventh Amendment and common law immunities through the crafting of allegations based upon policymaking regarding prosecution rather than the acts taken pursuant to such policy. However, this purported differentiation of prosecutorial responsibilities is really no distinction at all. Rather, the development of policies regarding prosecution is an integral part of the prosecutorial function itself and is entitled to no less immunity than that accorded to actions taken pursuant to such policies.

Respondent's Complaint challenges the manner in which the District Attorney's Office discharged its law enforcement responsibilities.[18] As the California Supreme

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cers. In fact, the District Attorney's Office has no duty or authority to train the Philadelphia Police Department, or to promulgate policies concerning such training. Rather, the Philadelphia Police Department is responsible for the training, supervision, and discipline of police. See Phila. Home Rule Charter, 351 Pa. Code §5.5-200(b).

The Philadelphia Home Rule Charter establishes the Police Department as a department within the Executive and Administrative Branch of city government. See Phila. Home Rule Charter, 351 Pa. Code §3.3-100. The Mayor of Philadelphia is the chief executive officer of the City and maintains ultimate responsibility for and control over the Executive and Administrative Branch of city government. See id. at §4.4-100. The Police Commissioner's appointment (by the City's Managing Director) is subject to the approval of the Mayor. See id. at §3.3-206. In contrast, the District Attorney's Office is a creature of state law, and is never even mentioned in the Philadelphia Home Rule Charter.

[18] Respondent did not challenge the management of the Dis-

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Court noted in Pitts v. County of Kern, 949 P.2d 920 (Cal. 1998), a case which the Third Circuit did not acknowledge, there is "[n]o meaningful analytical distinction" between enforcing the state's criminal laws and developing policy and training with respect to enforcing the state's criminal laws. Id. at 935. Moreover, "[i]t is difficult to imagine ... how criminal prosecutions could be conducted with any efficiency absent these functions." Id. See also Roe v. City and County of San Francisco, 109 F.3d 578 (9th Cir. 1997)(absolute immunity applies to policy regarding prosecution of cases); Haynesworth v. Miller, 820 F.2d 1245 (D.C. Cir. 1987) (same); Doe v. Mayor and City Council of Pocomoke City, 745 F.Supp. 1137 (D. Md. 1990)(same). See also Hamilton v. Daley, 777 F.2d 1207, 1213 n.5 (7th Cir. 1985) ("Since absolute immunity protects prosecutorial decisions, supervision of the prosecutors who make these decisions is similarly immune"); Burge v. Parish of St. Tammany, No. 91-2321 Sec: E/3, 1997 U.S. Dist. LEXIS 114, at *30-*31 (E.D. La. Jan. 9, 1997)(absolute prosecutorial immunity bars state law claims based upon failure to train and inadequate maintenance of prosecutors' files since "these are functions of the prosecutors' role in the judicial process of prosecuting criminal defendants. They cannot be segregated from the DA defendants prosecutorial duties but are a means of accomplishing them...."). But see Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992)(training and supervision of Assistant District Attorneys regarding obligations to disclose exculpatory evidence and avoid use of perjured evidence is a non-prosecutorial function), cert. denied, 113 S. Ct. 1387, and

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trict Attorney's Office with respect to matters of internal personnel administration (see, e.g., Coleman v. Kaye, 87 F.3d 1491 (3d Cir. 1996), cert. denied, 519 U.S. 1084 (1997)).

cert. denied, 113 S. Ct. 1412 (1993); Myers v. County of Orange, 157 F.3d 66 (2d Cir. 1998)(policymaking regarding initiation of prosecution is a nonprosecutorial function), cert. denied, 119 S. Ct. 1042 (1999).

The enforcement of the state's criminal laws involves more than solely showing up in court to try cases. The District Attorney's Office is vested with the responsibility for criminal law enforcement on behalf of the Commonwealth and that responsibility necessarily includes the development of prosecution policies and training Assistant District Attorneys. The integral relationship between law enforcement policy and conduct taken pursuant to it is indicated by the very nature of civil rights claims based upon policy: an individual can bring no claim based upon policy unless action taken pursuant to that policy violated that individual's constitutional rights. Monell, 98 S. Ct. at 2036. In other words, claims based upon a policy do not arise in a vacuum, but rather are inextricably connected with the activity which such policy addresses. Therefore, whether or not the development and promulgation of a policy is a "managerial" or "prosecutorial" function must necessarily be determined by the nature of the conduct that is the subject of the policy.

The Third Circuit's decision enables plaintiffs to automatically circumvent the Eleventh Amendment and common law prosecutorial immunity by crafting their allegations to be based upon "policy" -- or, if expedient, the absence of policy. However, the purposes underlying constitutional and common law immunity would be wholly undermined were prosecutors' offices and their policymakers subject to suit for their formulation of policies pursuant to

which specific prosecutorial actions were undertaken.[19]

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[19] The Third Circuit exacerbated the inevitable consequences of its "policy" holding by cryptically concluding that respondent could plead a claim based upon policy without actually identifying any policy or attributing it to a policymaker. 181 F.3d at 357-58 (App. 45). The Court thus adopted a standard for pleading a claim based upon an alleged policy (or lack thereof) which effectively obviates the pleading requirements of the Federal Rules of Civil Procedure. See Fed.R.Civ.P. 8.

Although plaintiffs are not required to plead municipal liability claims with specificity, plaintiffs alleging such claims are not absolved from compliance with the Federal Rules of Civil Procedure. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993). Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." The ability to plead adequately a claim based upon policy by the mere invocation of the word "policy," with no more extensive pleading, reduces even the most liberal pleading standard to a nullity. As the Seventh Circuit has recognized:

> "Boilerplate allegations of a ... policy, entirely lacking in any factual support that a ... policy does exist, are insufficient .... The absence of any facts at all to support plaintiff's claim renders the allegations mere legal conclusions of section 1983 liability devoid of any well-pleaded facts."

McTigue v. City of Chicago, 60 F.3d 381, 382-83 (7th Cir. 1995) (quoting Baxter by Baxter v. Vigo County Sch. Bd., 26 F.3d 728, 736 (7th Cir. 1994)). See also Nicole K. v. Upper Perkiomen School District, 964 F.Supp. 931 (E.D. Pa. 1997).

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Plaintiffs could evade the protections of immunity merely by recasting their claims as based upon "policy" rather than the particular actions taken in connection with their own criminal prosecution.[20]

The Third Circuit's decision characterizing prosecutorial policymaking as a nonprosecutorial function and, thus, enabling plaintiffs to evade Eleventh Amendment and common law immunity by summarily basing their allegations on "policy," conflicts with the law of the Supreme Court as well as the law of other circuits, thereby warranting review.

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The Third Circuit has thus opened the floodgates to claims against District Attorney's Offices and individual policymakers within District Attorney's Offices. Plaintiffs will allege that any allegedly injurious conduct was undertaken pursuant to "policy" and thereby circumvent Eleventh Amendment and common law immunity and compel prosecutors' offices to undergo lengthy and costly litigation in response to such claims, defeating in large part the very purpose of immunity.

[20] That the only conduct giving rise to respondent's Complaint is necessarily conduct undertaken in the course of respondent's own criminal prosecution is made even more apparent by the dearth of pleading in respondent's Complaint concerning his allegations of policy.

CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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DATE: September 16, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1581

RAYMOND CARTER,
Appellant

vs.

CITY OF PHILADELPHIA; THOMAS RYAN, INDIVIDUALLY AND AS A POLICE OFFICER FOR THE CITY OF PHILADELPHIA; JOHN DOE, AN UNKNOWN POLICE OFFICER(S) AND OR DETECTIVE(S) FOR THE CITY OF PHILADELPHIA, LYNNE ABRAHAM, PHILADELPHIA DISTRICT ATTORNEY IN HER OFFICIAL CAPACITY; RICHARD ROE, POLICE OFFICER REPRESENTING UNKNOWN EMPLOYEES OF THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY; WAYNE SETTLE, INDIVIDUALLY AND AS A POLICE OFFICER FOR THE CITY OF PHILADELPHIA; MICHAEL DUFFY, INDIVIDUALLY AND AS A POLICE OFFICER FOR THE CITY OF PHILADELPHIA

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-04499)

Before: Honorable Bruce W. Kauffman No. 98-1581

Present: Mansmann, Scirica, and Nygaard, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 19, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 19, 1998, be, and the same is hereby reversed and the cause is remanded for further proceedings. Costs taxed against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: April 28, 1999

Filed April 28, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1581

RAYMOND CARTER,
Appellant

vs.

CITY OF PHILADELPHIA; THOMAS RYAN, INDIVIDUALLY AND AS A POLICE OFFICER FOR THE CITY OF PHILADELPHIA; JOHN DOE, AN UNKNOWN POLICE OFFICER(S) AND OR DETECTIVE(S) FOR THE CITY OF PHILADELPHIA, LYNNE ABRAHAM, PHILADELPHIA DISTRICT ATTORNEY IN HER OFFICIAL CAPACITY; RICHARD ROE, POLICE OFFICER REPRESENTING UNKNOWN EMPLOYEES OF THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY; WAYNE SETTLE, INDIVIDUALLY AND AS A POLICE OFFICER FOR THE CITY OF PHILADELPHIA; MICHAEL DUFFY, INDIVIDUALLY AND AS A POLICE OFFICER FOR THE CITY OF PHILADELPHIA

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-04499)
Before: Honorable Bruce W. Kauffman

Argued
March 10, 1999

Before: MANSMANN, SCIRICA and NYGAARD,
Circuit Judges.

(Filed April 28, 1999)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

In this appeal we must first determine whether our requirement that a district court provide a brief statement of reasons in certifying a judgment for appeal pursuant to Fed. R. Civ. P. 54(b) precludes our exercise of jurisdiction to hear the appeal where we are otherwise able to ascertain the propriety of the certification from the record. Exercise of jurisdiction and consideration on the merits in turn require that we decide, as a matter of first impression, whether Pennsylvania's Eleventh Amendment immunity extends to Philadelphia District Attorneys for claims arising from administrative and policymaking - rather than prosecutorial - functions. We must also determine whether, if sovereign immunity does not apply, the official capacity claims are alternatively barred by absolute prosecutorial immunity. Finally, we must consider whether claims against unknown policymakers in the

Philadelphia District Attorney's Office in their personal capacity have been adequately pled.

The Philadelphia District Attorney's Office contends that because the DA's Office acts in the name of the Commonwealth and carries out a sovereign function, it is entitled to share in the Commonwealth's sovereign immunity as an arm of the state. The District Court accepted this contention, holding that application of the factors by which we determine Eleventh Amendment immunity weighed "strongly in favor of finding that the District Attorney's Office, when performing its historic functions of investigating and prosecuting crimes on behalf of the Commonwealth, is an 'arm of the state' not subject to suit in federal court without its consent."[1] The District Court further dismissed claims against unknown policymakers in the DA's Office in their personal capacity for failure to state a cause of action under 42 U.S.C. § 1983.

Because we find that the consequences of the District Court's failure to provide a statement of reasons need not be visited on the parties by delaying resolution of their case when the ripeness of the appeal is apparent, we will exercise jurisdiction. On the merits, we find that (1) the performance of an essential sovereign function does not of itself give rise to state surrogate status under Pennsylvania law; (2) a correct application of the factors we set forth in *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655 (3d Cir. *en banc*), *cert. denied*, 493 U.S. 850 (1989), compels a finding that the Commonwealth's sovereign immunity does not encompass the DA's Office; and (3) even if the DA's Office were entitled to sovereign immunity as a state actor during the

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[1] *Carter v. City of Philadelphia*, 4 F. Supp. 2d 386, 393 (E.D. Pa. 1998).

performance of its prosecutorial function, such immunity would not extend to the local office administrative, investigative and management functions which underlie this action. We will, therefore, reverse the District Court's holding that the DA's Office is entitled to sovereign immunity for purposes of the claims at hand. We reject the alternative assertion of absolute prosecutorial immunity as lacking merit where the cause of action lies on administrative and investigative, rather than prosecutorial, conduct. Finally, because we find that the section 1983 claims against unknown policymakers in the DA's Office in their personal capacities have been adequately pled and Carter should be allowed to pursue discovery, we will also reverse the District Court's dismissal of those claims.[2]

I. FACTUAL BACKGROUND

Raymond Carter had been convicted of murder and had served ten (10) years of a life sentence without possibility of parole before his conviction was overturned and the case against him *nol prossed* following disclosures of longstanding corruption within Philadelphia's 39th Police District.[3] Carter then brought an action against the City of

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[2] The District Court declined to exercise supplemental jurisdiction over Carter's state law claims when factually related federal claims remained pending against other defendants. Because we will reverse the District Court's dismissal of Carter's federal claims against the DA's Office, we need not address whether this was consistent with the sound exercise of judicial discretion.

[3] During disclosures of police misconduct uncovered during an investigation of that district, it came to light that the single

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Philadelphia, named police officers,[4] unknown employees of the Philadelphia Police Department, and unknown policy-makers within the Philadelphia DA's Office.[5]

Carter's action against individuals in the DA's Office was premised on their failure as administrators to establish training, supervision and discipline policies which would have (a) prevented or discouraged Philadelphia police officers from procuring perjurious "eyewitnesses" and (b) alerted assistant district attorneys to the falsity of such information and prevented its introduction as evidence.[6] The District Court dismissed all claims against the DA's Office, concluding that those defendants were "state officials" and therefore immune from suit for acts in their professional capacity by

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eyewitness's testimony placing Carter at the murder scene - the testimony on which his conviction rested - was purchased by a 39th District officer, Thomas Ryan, from a prostitute-informant (Ms. Jenkins) with whom Ryan was intimate. In subsequent proceedings, Ryan was convicted of obstruction of justice and Jenkins admitted her perjured testimony. There was no forensic evidence linking Carter to the crime scene and Carter maintains his innocence.

[4] Carter names Thomas Ryan, Wayne Settle, and Michael Duffy individually and as police officers for the City of Philadelphia.

[5] Carter brings a section 1983 action, together with various state causes of action, against the defendants.

[6] Carter also alleges that the DA's Office failed to disclose exculpatory evidence found in its post-conviction investigation.

virtue of the Eleventh Amendment.[7] It further concluded that Carter had failed to state a cause of action against those defendants in their personal capacities. Finally, it declined to exercise supplemental jurisdiction over Carter's state law claims. The District Court subsequently entered a revised order rendering the judgment final pursuant to Rule 54(b),[8] but neglected to set forth specific findings in support of its decision to grant 54(b) certification, despite our express direction in previous cases that district courts do so.

II. JURISDICTION

Ordinarily, an order which terminates fewer than all claims, or claims against fewer than all parties, does not constitute a "final" order for purposes of appeal under 28 U.S.C. § 1291. Fed. R. Civ. P. 54(b), however, provides that such an order may be final and immediately appealable under § 1291 when the district court makes an express determination that there is no just cause for delay and expressly directs entry of final judgment.[9] We consistently

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[7] The District Court framed the question before it as "[w]hether the District Attorney's Office, when performing its investigatory and prosecutorial functions, is an 'arm of the state' under the Eleventh Amendment." *Carter*, 4 F. Supp. 2d at 390.

[8] The order states that "[p]ursuant to Rule 54(b) . . . , the Court finds that there is no just reason for delay and, accordingly, directs that final judgment be entered in favor of [the DA's Office] and against Carter on all claims . . . ."

[9] When more than one claim for relief is presented in an action, . . . , or when multiple parties are involved, the court may direct the entry of a final judgment as to one or

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require that district courts provide a statement of reasons when entering final judgment under Rule 54(b). *See, e.g., Waldorf v. Shuta*, 142 F.3d 601, 610-11 (3d Cir. 1998); *Anthius v. Colt Industries Operating Corp.*, 971 F.2d 999, 1003 (3d Cir. 1992); *Metro Transportation Co. v. North Star Reinsurance Co.*, 912 F.2d 672, 677 (3d Cir. 1990); *Cemar Inc. v. Nissan Motor Corp.*, 897 F.2d 120, 123 (3d Cir. 1990).[10] We have remanded cases in which a district court's failure to provide the reasons supporting its exercise of discretion renders us "unable to conclude that the granting of the

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> more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment . . . .

Fed. R. Civ. P. 54(b).

[10] Our requirement that a district court accompany a Rule 54(b) certification with a statement of the reasons comes from our "endorse[ment]" and "incorporati[on], in *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3d Cir. 1975), of the Second Circuit's

> suggest[ion] to the district courts that . . . it would be helpful to [the appellate court] in reviewing the exercise of discretion in granting a Rule 54(b) certification if the court . . . would make a brief reasoned statement in support of its determination that 'there is no just reason for delay' and its express direction for 'the entry of a final judgment . . .' *where the justification for the certification is not apparent.*

Gumer v. Shearson, Hammill & Co., 516 F.2d 283 (2d Cir. 1974) (quoted in *Allis-Chalmers*, 521 F.2d at 364) (emphasis added).

Rule 54(b) certification was proper."[11] We have not had occasion to address the result when, notwithstanding the absence of the required explanation, the propriety of appeal under 54(b) is apparent to the reviewing court on the record.

Other courts of appeals have held that a district court's failure to state the reasons for its Rule 54(b) certification does not pose a jurisdictional barrier to appeal. The prevailing rule is perhaps best expressed in *Bank of Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944 (7th Cir. 1980):

> [Articulation of the considerations underlying the district court's discretionary certification] constitutes the "better practice," and the failure to provide a written statement of reasons may in an appropriate case lead to a remand for such a statement.
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> The statement is, however, primarily an aid to the appellate court to permit it to review the exercise of the trial court's discretion. The failure of the district court to make a written statement at the time it makes a 54(b) certification is not a jurisdictional defect, . . . and need not occasion even a remand if the basis for

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[11] *Allis-Chalmers*, 521 F.2d at 357; *see also Cemar*, 897 F.2d at 122 (noting that "*[b]ecause the reason for the Rule 54(b) certification [was] not apparent from the record*," we required "a statement of reasons by the district court in order to determine the juridical concerns [were] met by its determination that no just reason remains for delay") (emphasis added).

the district court's determination is otherwise apparent.

Id. at 948-49.[12]

Although we have not yet addressed whether an appeal may go forward when, notwithstanding the absence of

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[12] *See also, e.g., Feinstein v. Resolution Trust Corp.*, 942 F.2d 32 (1st Cir. 1991) (holding that appellate jurisdiction attached notwithstanding district court's failure to state reasons for certification where justification was apparent and sufficient); *Pension Ben. Guar. Corp. v. LTV Corp.*, 875 F.2d 1008 (2d Cir. 1989) (holding court of appeals had jurisdiction although district court did not provide reasoned explanation for certification where it was clear explanation could easily be provided and interest of sound judicial administration favored expeditious resolution of conflict); *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218 (5th Cir. 1990) (holding appropriate certification of order dismissing all claims against one defendant where order and record taken together signaled district court's conclusion that requirements of the rule had been met); *Fuller v. M.G. Jewelry*, 950 F.2d 1437 (9th Cir. 1991) (holding that 54(b) certification did not have "jurisdictional defect" merely because district court did not include specific findings regarding appropriateness of certification); *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162 (11th Cir. 1997) (explaining that where reasons for entry of separate judgment for fewer than all parties or claims are obvious, and remand would result only in unnecessary delay in appeal process, the court of appeals will not require explanation; but when the sound basis for certification is not obvious, the court must dismiss the appeal for lack of final judgment). *Cf. Corrosioneering, Inc. v. Thyssen Environmental Sys.*, 807 F.2d 1279 (6th Cir. 1986) (stating that in absence of reasons for certification no deference will be given to decision to certify and reviewing propriety of certification de novo).

the required explanation, the propriety of certification under Rule 54(b) is apparent on the record, we have previously indicated that we share the prevailing view. *See supra* note 11. In our recent decision in *Waldorf*, however, we indicated that we had dismissed an earlier appeal "for want of jurisdiction" because the district court failed to "provide a written opinion outlining its reasons for certification." 142 F.3d at 611. *See also Anthius v. Colt Industries Operating Corp.*, 971 F.2d 999 (3d Cir. 1992) (indicating that certification without explanation is not "competent" and we were therefore "obliged to dismiss").[13]

Assuming that sufficient justification for certification may be discerned from the record in the present case, the *Allis-Chalmers, Waldorf* and *Anthius* cases are distinguishable because due to their complexities we were unable to conclude that certification was proper absent explication by the district court.[14] In none of these cases was

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[13] This interpretation may follow from *Allis-Chalmers*'s holding that the 54(b) certification "must be vacated because of the failure of the court to articulate reasons for the certification," 521 F.2d at 361, and from its statements that "[a] proper exercise of discretion under Rule 54(b) requires the district court to do more than just recite the 54(b) formula," and that "we incorporate [the giving of a brief reasoned statement] as a requirement for all Rule 54(b) certifications," *id.* at 364. *But see Bank of Lincolnwood*, 622 F.2d at 949 (citing *Allis-Chalmers*, 521 F.2d at 367 n.16 "(remanding case for a statement of reasons)" for the proposition that failure to provide a written explanation with certification is not a jurisdictional defect).

[14] *See Allis-Chalmers*, 521 F.2d at 365 (concluding that absent petitioner's demonstration of unusual or harsh circum-

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there any indication that the majority believed the propriety of the certification was apparent but that the appeal must nonetheless be dismissed.[15] Consequently, any suggestion in the language of these cases that the *Allis-Chalmers* statement-of-reasons requirement deprives us of appellate jurisdiction where the propriety of the district court's certification is determinable from the record is, at most, dicta. That question remains open for our decision.

A rule requiring remand or dismissal even when the propriety of immediate appeal is apparent would not optimally balance the competing concerns that must inform our interpretation of Rule 54(b). *See Curtiss-Wright*, 446 U.S. at

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stances, the presence of a counterclaim "weighed heavily" against the district court's grant of certification); *Waldorf*, 142 F.3d at 611-612 (discussing complexity of case and potential interrelationship of claims and cross-claims); *Anthius*, 971 F.2d at 1003 n.3 (stating that court's "familiarity with the issues and arguments" makes it "question whether there could ever be a proper exercise of judicial discretion which would result in an 'entry of final judgment' certification under Fed. R. Civ. P. 54(b)").

It should be noted that the holding of *Allis-Chalmers* as to the significance of counterclaims was rejected by the Supreme Court in *Curtiss-Wright Corp. v. General Electric Co.*, 466 U.S. 1 (1980).

[15] *Cf. Curtiss-Wright Corp. v. General Elec. Co.*, 599 F.2d 1259, 1261 (3d Cir. 1979) (Gibbons, J., dissenting) (noting that his dissent in *Allis-Chalmers* was directed to the majority's "unprecedented and unwarranted imposition of a 'statement of reasons' requirment in a case where the justification for certification was [in J. Gibbons's opinion] glaringly apparent on the face of the record").

2, 100 S. Ct. at 1462 (explaining that decision to certify must take into account the interests of sound judicial administration and the equities involved); *Allis-Chalmers*, 521 F.2d at 363 ("The rule attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties."); *see also Waldorf*, 142 F.3d at 608 (observing that question in certification is whether the issue was "ready for appeal . . . tak[ing] into account judicial administrative interests as well as the equities involved").

In view of these concerns, *Alliss-Chalmers's* requirement of a statement of reasons in every case stands not as a jurisdictional prerequisite but as a prophylactic means of enabling the appellate court to ensure that immediate appeal will advance the purposes of the rule.[16] It follows that the absence of an explanation by the district court does not pose a jurisdictional bar when the propriety of the appeal may be discerned from the record.

Therefore, to the extent *Allis-Chalmers* or a subsequent case may be read to have suggested (in dicta) that our mandatory statement-of-reasons requirement in Rule 54(b)

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[16] Indeed, as we acknowledged in *Allis-Chalmers* in "endors[ing]" *Gumer*, the purpose of the appellate courts' first suggestion - in 1974 - that district courts provide an explanation "where the justification for the certification is not apparent" was to facilitate appellate review in its threshold jurisdictional inquiry. *See Gumer*, 516 F.2d at 284, 286; *Allis-Chalmers*, 521 F.2d at 364 ("It is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions . . . and . . . approval . . . unsupported by evaluation of the facts or analysis of the law. . . .") (quoting *Protective Committee v. Anderson*, 390 U.S. 414, 434 (1968)).

certifications stands as a jurisdictional bar prohibiting appellate review even where the propriety of the certification is apparent from the record, we now clarify that the better reading of *Allis-Chalmers* is that although it is always the best practice for district courts to explain a decision to certify a judgment for appeal and we require them to do so, their failure to meet this directive need not result in dismissal or remand where judicial economy - which is the purpose of the finality requirement of § 1291, as implemented in Rule 54(b),[17] - would not be served.[18] Accordingly, we will proceed to reach the merits on appeal when a sufficient basis for a district court's certification is otherwise apparent.[19]

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[17] *See, e.g., Curtiss-Wright*, 466 U.S. at 10 (identifying the "interest of sound judicial administration" as the standard against which a district court's 54(b) certification is to be judged).

[18] *Cf. Kelly*, 908 F.2d at 1220 ("[r]ejecting a 'form-over-substance' approach that 'would not significantly advance the purposes of Rule 54(b) . . .'" in holding sufficient certification based on record) (quoting *Crowley Maritime Corp. v. Panama Canal Comm'n*, 849 F.2d 951, 953 (5th Cir. 1988)); *St. Paul Fire and Marine Ins. Co. v. Pepsico, Inc.*, 884 F.2d 688, 694 (2d Cir. 1989) (noting that purpose of Rule 54(b) is served by exercise of jurisdiction where justification for certification is clear on record). As the Court of Appeals observed in *Kelly*, Fed. R. Civ. P. 1 directs that the rules be "construed to secure the just, speedy and inexpensive determination of every action." 908 F.2d 1221.

[19] This interpretation of *Allis-Chalmers* is consistent with the approach to Rule 54(b) certifications directed by the Supreme Court in *Curtiss-Wright*. As discussed *supra* note 14, *Curtiss-Wright* rejected our previous conclusion that the existence of a counterclaim will ordinarily defeat certification. That decision

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Here, despite the District Court's inadvertence, the requirements of Rule 54(b) are clearly met. This case unquestionably involves multiple claims and parties; the decision below was a "final judgment" in the sense that it was an "ultimate disposition" of Carter's claims against the DA's office. *See Curtiss-Wright*, 446 U.S. at 7. The only real question is whether there is any just reason for delaying appeal until disposition of Carter's claims against the remaining defendants. The Supreme Court has interpreted this requirement as balancing considerations of judicial administrative interests (preservation of the federal policy against piecemeal appeals) and equities (justice to the litigants). *See id.*, 446 U.S. at 8. Factors to be considered therefore include "whether the claims under review [are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined [is] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Id.* Here, the issue presented is plainly separable and there is no real risk of duplicative appeals, as the Eleventh Amendment defense which was the basis of the District Court's dismissal of claims against the DA's Office is not asserted to be applicable to any of the remaining defendants.[20] On the other hand, denial of an immediate appeal may pose a substantial

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reflects the Supreme Court's general disapproval of inappropriately restrictive views of Rule 54(b) certification, and it counsels us to remain mindful of the competing concerns.

[20] Although there may be some factual overlap between the issues in this appeal and those in a potential future appeal concerning qualified immunity of the remaining defendants, the same issues are not likely to be presented. It is generally recognized

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risk that the District Court and the parties will be forced to undergo duplicative trials. Thus, on balance, the interests of judicial economy favor hearing the appeal. Finally, the importance of the issue presented by this appeal also militates in favor of our prompt consideration. Remand to the District Court for technical compliance at this time, when justification is already apparent, would unduly delay the proceedings.

Therefore, although we adhere to our consistent requirement that the district courts provide a brief statement of reasons in certifying a judgment for appeal pursuant to Rule 54(b) in this and in every case, we nevertheless hold that we have jurisdiction to hear this appeal because we are able to ascertain the propriety of the Rule 54(b) certification from the record. To hold otherwise would undermine the policies which Rule 54(b) seeks to advance.

III. ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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that complete legal or factual distinction is not necessary to 54(b) certification. *See* 10 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2657 at 50-54.

Despite its language, the Supreme Court has consistently interpreted the Amendment to immunize an unconsenting state "from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984) (quoting *Employees v. Missouri Dept. Of Public Health and Welfare*, 411 U.S. 279, 180 (1973)). In addition, a suit may be barred "even though the state is not named a party to the action, *as long as the state is the real party in interest*." *Fitchik*, 873 F.2d at 658 (citing *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)) (emphasis added).

Eleventh Amendment immunity is an affirmative defense and the burden is thus on the DA's Office to establish its immunity from suit. *See Christy v. Pennsylvania Turnpike Commission*, 54 F.3d 1140, 1144 (3d Cir. 1985) ("[T]he party asserting Eleventh Amendment immunity (and standing to benefit from its acceptance) bears the burden of proving its applicability."). We determined Eleventh Amendment immunity by examining the evidence on three factors: (1) the source of funding - *i.e.* whether payment of any judgment would come from the state's treasury, (2) the status of the agency/individual under state law, and (3) the degree of

autonomy from state regulation.[21] *See Fitchik*, 873 F.2d 655.[22]

Although the District Court applied the appropriate three factors, it erred both in its analysis of the individual factors, and in their balancing.

(1) *Funding* - The DA's Office acknowledges that it is funded by the City of Philadelphia and that the funds for any

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[21] The DA's Office asserts that a fourth factor was later added by the Supreme Court in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) - viz., whether the functions at issue are "typically state or unquestionably local." The *Hess* Court did not adopt this distinction as a criterion for determining state status; it did not adopt or formulate any test. Indeed, the Court concluded that this purported "fourth factor" did not advance its inquiry. *See Hess*, 513 U.S. at 45. Moreover, to the extent that the distinction may be relevant, it appears to be subsumed within *Fitchik*'s "status under state law" test.

[22] *Fitchik* reformatted our test for Eleventh Amendment immunity from the nine questions identified in *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970). Funding encompasses the *Urbano* inquiry into whether satisfaction of a judgment would come from the state treasury, whether the agency had funds to satisfy the judgment, and whether the sovereign was immunized from responsibility for the agency's debt. Status encompasses the *Urbano* inquiry into how state law treated the agency generally, whether it was separately incorporated, could sue or be sued in its own right, or was immune from state taxation. Autonomy continues to address the *Urbano* inquiry into the degree of autonomy from state control. *Fitchik* specifically rejected the ninth *Urbano* factor, inquiry into whether the individual performed a governmental or proprietary function, as no longer relevant. *See* 873 F.2d at 659 n.2.

judgment against it would come from the City.[23] We have twice held *en banc* that the three *Fitchik* factors are not weighed evenly and that the "most important" question in determining Eleventh Amendment immunity is "whether any judgment would be paid from the state treasury." *Bolden v. Southeastern Pennsylvania Transportation Authority*, 953 F.2d 807, 816 (3d Cir. 1991); *Fitchik*, 873 F.2d at 659. As we explained in *Christy*, "[t]he special emphasis we place upon the funding factor is supported by the Eleventh Amendment's central goal; the prevention of federal court judgments that must be paid out of the state's treasury." 54 F.3d at 1145.[24]

We are not alone in emphasizing the importance of the funding factor. The Supreme Court recognized in *Hess* that the vulnerability of the state's purse is considered "the most salient factor" in Eleventh Amendment determinations. *See* 513 U.S. at 48 (citing courts of appeals cases at length). Indeed, the "vast majority of [courts of appeals] . . . have concluded that the state treasury factor is the most important factor to be considered . . . and, in practice, have generally accorded it dispositive weight." *Id.* at 49 (ellipses in original) (quoted in *Christy*, 54 F.3d at 1145).

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[23] *See Carter*, 4 F. Sup. 2d at 390. *Cf.* 16 Pa. Stat. Ann. § 1403 (district attorney's expenses to be paid by county from its general funds).

[24] *See also Hess*, 513 U.S. at 50 (describing "prevention of federal-court judgments that must be paid out of a State's treasury" as "the impetus for the Eleventh Amendment" and explaining that if the state is not obligated to pay any indebtedness, "then the Eleventh Amendment's core concern is not implicated").

In *Fitchik* we concluded that non-applicability of state funds provides an "extremely strong" indication that an agency is not the alter-ego of the state, so that the first factor weighed heavily against a finding of immunity. 873 F.2d at 664. The funding factor weighs even more heavily against immunity in this case than it did in *Fitchik* and *Bolden*, where approximately one-third and one-fourth, respectively, of the agencies' funds were provided by the states. *See Bolden*, 953 F.2d at 819. Here, despite the DA's efforts to elevate a statutory funding mandate to the status of "indirect" funding, it appears that *no* portion of the DA's funds are provided by the state and *no* portion of any judgment will be paid directly or indirectly by the state.[25] As we reasoned in *Bolden*, "this most important fact weighs more heavily" against immunity as the proportion of state funding decreases. *Id.*

(2) *Status under State Law* - The status of the DA's Office under state law is necessarily derived from Pennsylvania's Constitution, statutory and decisional law.[26] As we defined this second question in *Fitchik*, it is whether state law treats an agency as an independent entity or as a surrogate for

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[25] *Cf. Christy*, 54 F.3d at 1145-1146 (rejecting arguments regarding state regulation of agency funding as irrelevant to the funding inquiry and reiterating that "under our case law" question is simply one of the state's "affirmative obligation to pay").

[26] *See, e.g., Regents v. Doe*, 519 U.S. 425 (1997) (explaining that federal question of whether state instrumentality has "independent status . . . or is instead . . . 'one of the United States' within the meaning of the Eleventh Amendment . . . . . can only be answered after considering the provisions of state law that define the agency's character").

(*i.e.*, as an arm of) the state. *See* 873 F.2d at 662; *Christy*, 54 F.3d at 1148 (same).

Pennsylvania's Constitution *expressly* defines District Attorneys as county rather than state officers. *See* Pa. Const., Article IX, Section 4 ("County officers shall consist of . . . district attorneys . . . and such others as may from time to time be provided by law."). The Pennsylvania Supreme Court has held equivalent language from a prior version of the Pennsylvania Constitution to be "crystal clear": the court explained that "[the Pennsylvania Constitution] states in the clearest imaginable language that district attorneys are county - not state - officers, and in Philadelphia, by virtue of [its Charter and a Constitutional amendment making county officers into officers of the city], are City - not State - officers, and no Procrustean stretch can alter or change or nullify this clear language." *Chalfin v. Specter*, 233 A.2d 562, 565 (Pa. 1967).[27] The DA's Office attempts to minimize this apparently controlling authority by arguing that "the only

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[27] The foregoing language is from the opinion of Chief Justice Bell, which was not joined by any other Justice. As the Chief Justice noted, however, "the majority of this 7 Judge Court agree . . . on this point and are convinced that under the Constitution of Pennsylvania . . . the District Attorney of Philadelphia is a City officer . . . ." *Id. See also id.* at 578 (Musmanno, J., dissenting) ("[I]n the present decision . . . FOUR Justices declare mathematically, specifically, and without equivocation that [the district attorney] is a CITY OFFICER.") (capitals in original); *id.* (Cohen, J., dissenting) ("The only position that enlists a majority of this Court determines that the District Attorney is a City Officer."); *id.* (Eagan, J., dissenting) ("Four of the seven members of this Court, including myself, are convinced that [the district attorney] is subject to the provisions of the Philadelphia Home Rule Charter . . .").

proposition with which four Justices agreed was that the Philadelphia District Attorney is subject to the Philadelphia Home Rule Charter for election purposes." As those four Justices clearly recognized, however, the Philadelphia Home Rule Charter by its terms applied only to Philadelphia officials, rather than state officials; and their opinions did not in any was differentiate between the District Attorney's status for election purposes or any other purposes.

Pennsylvania's statutes also reflect the local status of the DA's Office. Under the Commonwealth Attorney's Act of 1850, 71 P.S. §§ 732-101, *et seq.*, district attorneys were redefined as the "chief law enforcement officer[s] for the county in which [they were] elected." *Id.* at § 732-206(a).[28] Since that time, local district attorneys have been elected[29] and funded[30] by their counties. Other provisions of Pennsylvania statutory law similarly treat district attorneys as county officials.[31] The DA's Office, which has the burden of proving its affirmative defense, does not identify any

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[28] Prior to 1850, district attorneys had been appointed by the Attorney General, a state executive, and were subject to his direct supervision and control.

[29] *See Chalfin*, 233 A.2d at 565 ("[I]t is important to further note that . . . the District Attorney of Philadelphia . . . is Elected in municipal [and not] State-wide elections . . . .").

[30] *See* note 23, *supra*.

[31] For example, the Attorney General participates as a "state employee" in the state's retirement program, while district attorneys participate in their County Retirement System pursuant to County Pension Law. *See* 16 P.S. §§ 11651-11682.

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Pennsylvania statutes treating local district attorneys as state, rather than county, officials. Finally, Pennsylvania's statute defining the scope of sovereign immunity does not encompass district attorneys within its detailed definitions of the agencies and employees protected from suit.[32]

Consistent with its constitutional and statutory law, Pennsylvania's case law defines district attorneys - Philadelphia District Attorneys in particular - as local, and expressly *not* state, officials. *See Chalfin*, 233 A.2d at 565. *See also, e.g., Schroeck v. Pennsylvania State Police*, 362 A.2d 486, 490 (Pa. Cmwlth. 1976) ("District Attorneys and their assistants are officers of the counties in which they are elected and not officers of the Commonwealth.) (citing Section 401(a)(11) of the County Code, as amended 16 P.S. § 401(1)(11)).[33]

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The Pennsylvania Supreme Court has found it significant that "the powers and functions of the [district attorneys'] office are found in Title 16, Counties, of Purdon's Statutes." *Duggan v. 807 Liberty Ave., Inc.*, 288 A.2d 750, 752 n.6 (Pa. 1972) (declining to hold district attorney as "officer of the Commonwealth" under jurisdiction of Commonwealth Court). *See also Cross v. Meisel*, 720 F. Supp. 486, 488 n.3 (E.D. Pa. 1989) (explaining that case regarding "state officials" was irrelevant to suit against district attorney because, besides constitutional definition as county officers, district attorneys' duties are defined in the County Code and their expenses are paid by the county from its general funds).

[32] *See* 42 Pa.C.S.A. §§ 102, 8501-8528.

[33] The Commonwealth has similarly declined to hold *assistant* district attorneys to be state officials. *See Specter v. Moak*,

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The DA's Office argues that the various authorities holding district attorneys to be local officials are inapplicable because they did not involve prosecutorial conduct. In the "law enforcement and prosecutorial" context, according to the DA's Office, "courts have uniformly held that the District Attorney is an arm of the state." None of the Pennsylvania authorities cited, however, actually holds that a district attorney is a state officer or arm of the state in *any* context. Rather, these authorities relied upon by the DA's Office merely hold that district attorneys act on behalf of and in the name of the Commonwealth in investigating and prosecuting crimes within their district.[34] *See, e.g. Commonwealth v. Bauer*, 261 A.2d 573 (Pa. 1970) (finding only that district attorney has power and duty to represent the Commonwealth's interests in law enforcement).

The District Court similarly equated simply acting in the name of the state with being an arm of the state entitled to share in its sovereign immunity. The District Court deemed the Pennsylvania authorities designating district attorneys as local officials irrelevant, because it erroneously believed

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307 A.2d 884 (Pa. 1973) (refusing to classify Philadelphia assistant district attorneys as state officers simply because they enforce Commonwealth penal laws of state-wide application "in the name of the Commonwealth").

[34] In *Chalfin*, Chief Justice Bell pointedly noted that "the essential and principal and most important powers, functions, duties, limitations and boundaries of the District Attorney of Philadelphia involve only crimes committed - not throughout the Commonwealth but - only in the City of Philadelphia." 233 A.2d at 565.

performance of a sovereign function, such as investigation and prosecution of crime, was alone sufficient to accord local prosecutors sovereign immunity.[35] This approach, however, clearly proves too much; many local officials act in the name of the state and carry out delegated sovereign functions. Under such an expansive theory, every police officer, for example, would be entitled to Eleventh Amendment immunity. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) ("[T]he Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities even though such entities exercise a 'slice of state power.'").[36]

Pennsylvania case law makes it clear that performance of an essential sovereign function on behalf of or in the name of the state does not given rise to state surrogate status under state law. *See Specter v. Commonwealth*, 341 A.2d 481, 485-88 (Pa. 1975) (declaring Turnpike Commission unentitled to sovereign immunity although it was constituted as an "instrument of the Commonwealth" and performed an

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[35] *See Carter*, 4 F. Supp. 2d at 390, 392 n.8 (dismissing constitutional provisions as "not in any way affect[ing] the District Attorney's function of investigating and prosecuting crimes in the name of the Commonwealth" and emphasizing that "[i]t would be hard to imagine functions more essential to the sovereignty of state government").

[36] The *Lake Country* Court observed that "some agencies exercising state power have been permitted to invoke the Amendment *in order to protect the state treasury from liability*" but rejected a more "expansive reading" that would effectively immunize every agency, unless it were expressly waived. *Id.* at 400-401 (emphasis added).

"essential government function of the Commonwealth"); *Pennsylvania Gamefowl Breeders Ass'n. v. Commonwealth*, 551 A.2d 361, 363 (Pa. Cmwlth. 1988) (finding district attorneys county officers, not state officers, although they are "charged with conducting criminal prosecutions in the name of the Commonwealth" and thus "perform sovereign functions of state government"); *Specter v. Moak*, 307 A.2d at 886 (rejecting Philadelphia Assistant District Attorneys' contention that "since they perform functions primarily on behalf of the Commonwealth they should be classified as state employees," reasoning that "[m]any officials" - such as the Mayor, Sheriff, Police Commissioner and City Solicitor - "perform state functions") (internal quotations omitted).[37] *Cf. Cross*, 720 F. Supp. at 488 n.3 ("Although it is true that certain sovereign powers of the Commonwealth are delegated to a district attorney, this is true generally of county and local officials . . . .").

Moreover, even if it were true that district attorneys act as an arm of the state, entitled to its sovereign immunity, whenever they perform prosecutorial functions in the name of the Commonwealth, it would not follow that the Eleventh Amendment immunizes the conduct at issue here.[38] The

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[37] The *Moak* Court further observed that it could not be argued that one is a state officer "merely because he has the duty to 'cause . . . the laws of the State to be executed and enforced.'" *Id.*

[38] Carter argues that the nature of the function should not be considered because the Eleventh Amendment focuses on the status of the entity as a whole, and the functional analysis is erroneously borrowed from section 1983 decisions. As the DA's Office observes, the propriety of the functional analysis has been

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District Court mischaracterized the basis of Carter's claim as a prosecutorial function and declined to distinguish the Philadelphia DA's training/supervision/administrative activities from its core state function of prosecution. In dismissing the possibility of a meaningful analytical distinction between a district attorney's prosecutorial and policy-making functions,[39] the District Court adopted a position which would inappropriately pull all functions of the office within the scope of its (purportedly sovereign) prosecutorial function. Other federal courts have taken a different view. They have acknowledged the obvious basis for distinction: making and applying county-wide policy differs from carrying out statewide policy and they have, therefore, repeatedly differentiated between administrative and prosecutorial functions, generally finding the former to be local and the latter to be state.

The most instructive (and analogous) case is *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992) from our sister court of appeals. Walker spent 19 years in prison after police officers and prosecutors covered up exculpatory evidence and committed perjury to secure his conviction. *Id.* at 294. In his section 1983 action, Walker alleged that the

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reserved by the Supreme Court. *See Regents v. Doe*, 117 S. Ct. 900, 902 n.2 ("Nor is it necessary to decide whether there may be some state instrumentalities that qualify as 'arms of the State' for some purposes but not others.") In the present case it is similarly unnecessary to reach this issue, as application of our *Fitchik* factors compels us to find that in Pennsylvania the prosecutor's office is not an arm of the state either generally or with respect to the managerial functions in question.

[39] *See Carter*, 4 F. Supp. 2d at 393.

district attorney's office failed adequately to train and supervise police with respect to the obligation to avoid use of perjury and suppression of exculpatory evidence. *Id.* at 295, 298. In holding that Walker stated a proper claim against the district attorney's office, the Court of Appeals determined that "the district attorney's management of the office - in particular the decision not to supervise or train [assistant district attorneys] on Brady[40] and perjury issues" - constituted policymaking for the county, rather than the state. *Id.* at 301. The Court observed that an earlier case holding that the district attorney is a state official[41] was limited to "specific decisions . . . to prosecute." *Id.* (citing *Gentile v. County of Suffolk*, 926 F.2d 142, 152 n.5 (2d Cir. 1991)). *See also Gan v. City of New York*, 996 F.2d 522, 536 (2d Cir. 1993) ("With respect . . . to claims centering not on decisions whether or not, and on what charges, to prosecute but rather on the administration of the district attorney's office, the district attorney has been treated not as a state official but rather as an official of the municipality to which he is assigned.") (citing *Walker* and *Gentile*).[42] As recently as last year, the Court of Appeals for the Second Circuit applied the *Walker* and *Gentile* holdings in finding a county liable under section

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[40] *Brady v. Maryland*, 373 U.S. 83 (1963) recognized that prosecutorial suppression of exculpatory evidence violates due process.

[41] *See Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988) ("[W]hen prosecuting a criminal matter, a district attorney in New York State . . . represents the State, not the county.").

[42] The *Gan* court's parenthetical descriptions of *Walker* and *Gentile* indicate that it considered "administration" to include "office policy governing . . . subornation of perjury" and "office policy as to disciplining of law enforcement personnel." *Id.*

1983 for its district attorney's implementation of a policy regarding investigative procedures. *See Myers v. County of Orange*, 157 F.3d 66, 77 (2d Cir. 1998).

Other courts of appeals have similarly recognized the hybrid nature of the district attorney's office - distinguishing between a DA's prosecutorial function and his role as elected county policymaker. *See, e.g., Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997) ("A county official 'pursues his duties as a state agent when he is enforcing state law or policy'" by conducting trials; but "[f]or those [remaining] duties that are administrative or managerial in nature, . . . a district attorney . . . functions as a final policymaker for the county.") (quoting *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990);[43] *Pusey v. City of Youngstown*, 142 F.3d 435 (6th Cir. 1998) (prosecutor is city official but acts as state agent when enforcing state law or policy); *Owens v. Fulton County*, 877 F.2d 947, 952 (11th Cir. 1989) ("[A]n official may simultaneously exercise county authority over some matters and state authority over others. . . . [A]n administrative function . . . might be characterized as an exercise of county power. However, . . . the district attorney's authority over prosecutorial decisions . . . is vested . . . pursuant to state authority."). *Cf. Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998) (sheriff is acting as county official, and not acting as agent of state, at time of alleged *failure to properly train subordinates or establish policies to protect arrestees*); *Scott v. O'Grady*, 975 F.2d 366, 370 (7th Cir. 1992) (sheriff is local official when serving as "chief law enforcement officer"

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[43] *See also Davis v. Ector County, Texas*, 40 F.3d 777 (5th Cir. 1995) (DA is local policy maker for purposes of personnel decision (firing), even though state official when enforcing state law).

of county, but arm of state when enforcing state court order).[44]

The recurring theme that emerges from these cases is that county or municipal law enforcement officials may be State officials when they prosecute crimes or otherwise carry out policies established by the State, but serve as local policy makers when they manage or administer their own offices. Indeed, we ourselves concluded in *Coleman v. Kaye*, 87 F.3d 1491, 1499 (3d Cir. 1996), that county prosecutors can have "a dual or hybrid status." When "enforcing their sworn duties to enforce the law . . . they act as agents of the State [but] when county prosecutors are called upon to perform administrative tasks unrelated to their strictly prosecutorial functions . . . the county prosecutor in effect acts on behalf of the county that is the situs of his or her office." *Id.* Absent direct intervention by the state, county prosecutors act as county officials when they are called upon to make administrative decisions on a local level. *See Coleman*, 87 F.3d at 1504 (applying New Jersey law).[45]

Reading the Complaint in the light most favorable to Carter, it appears that the function complained of here is not prosecutorial, but administrative: it involves local policies relating to training, supervision and discipline, rather than

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[44] *Cf.* Commonwealth Attorney's Act of 1850, 71 P.S. §§ 732-206(a), defining district attorneys as the "chief law enforcement officer[s] for the county in which [they were] elected."

[45] In *Coleman* we distinguished between the "day-to-day management of the prosecutor's office" - a function in which the DA acts as a county official - and the use of a "grossly erroneous" search warrant - an investigatory and prosecutorial function in which he acts as a state official. *Id.* at 1502, 1505.

decisions about whether and how to prosecute violations of state law. Therefore, even if a member of the Philadelphia DA's Office were deemed a state actor with respect to prosecutorial functions, she would nevertheless be a local policymaker with respect to the conduct at issue here.

(3) *Autonomy* - When the District Court considered autonomy from the Commonwealth, it concluded that factor weighed strongly in favor of immunity.[46] This finding is contrary to Pennsylvania's consciously and deliberately designed autonomous role for its district attorneys; it is also contrary to our prior decisions. In Pennsylvania, the Attorney General (the "AG") is without authority to replace a district attorney (who must be impeached, like other locally elected officials) and in Pennsylvania, unlike many other jurisdictions, the AG has no inherent authority to supersede a district attorney's decisions generally.[47] The Pennsylvania

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[46] The District Court initially focused on the political autonomy of the DA's Office from the City of Philadelphia. Autonomy is measured, however, by the DA's Office's relationship with the Commonwealth (*i.e.*, the more autonomous, the less an "alter ego" of the state). Moreover, the asserted autonomy from the City actually supports Carter's position with respect to the "failure to state a claim" argument addressed *infra* Section V, as it underscores the DA's role as final policymaker on law enforcement issues for the City. *Cf. Degenova v. Sheriff of DuPage County*, 18 F. Supp. 2d 848, 852 (N.D. Ill. 1998).

[47] *See Commonwealth v. Lawson*, 658 A.2d 801, 803 (Pa. Super. 1995) (describing *Commonwealth v. Khorey/Trputec*, 555 A.2d 100 (1989), as "establishing categorically that the Attorney General, pursuant to statute which supplanted common law, has no authority to supersede the District Attorney"); *Commonwealth v. Carsia*, 491 A.2d 237, 251 (Pa. Super. 1985) (explaining that

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AG is permitted only a narrowly circumscribed power to supersede a district attorney in a particular criminal prosecution subject to court authorization under an abuse of discretion standard (or at the district attorney's own invitation).[48] The mere possibility of supersession by the AG through cumbersome court proceedings is insufficient to support the District Court's conclusion that lack of autonomy weighed in favor of holding the DA's Office an arm of the state.

To the contrary, in *Coleman* we concluded that "[d]espite the Attorney General's statutory power of supersession, '. . . the [county] prosecutors are largely independent of control by the attorney general . . . .'" 87 F.3d at 1504 (quoting *Morss v. Forbes*, 132 A.2d 1, 16 (N.J.

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limited criminal jurisdiction extended to AG in Commonwealth Attorney's Act reflected legislature's concerns that it not "imping[e] upon the jurisdiction and duties of the constitutionally created office of county-elected district attorney").

[48] *See* 72 P.S. § 732-205(a)(3)-(5).

The Pennsylvania Supreme Court has explained that although the AG "had the common law power to replace his own deputies," that "does not justify the conclusion that he now has the right to supersede an elected district attorney." *Commonwealth v. Schab*, 383 A.2d 819 (Pa. 1978). In refusing to require at the AG's request prosecution of a homicide the district attorney deemed excusable, the Court observed that "[i]t would be incongruous to place a district attorney in the position of being responsible to the electorate for the performance of his duties while actual control over his performance was, in effect, in the attorney general." *Id.*

1957)).[49] As we concluded in *Coleman*, "[i]t would be an unwarranted extension of the implications of the Attorney General's supersedure authority to conclude that the mere possibility of its exercise can somehow serve to bring [issues of "day-to-day management of the county prosecutor's office"] within the purview of the Attorney General's control." 87 F.3d at 1502.

In addition to the AG's power to supersede a particular failure to prosecute (with court approval), the District Court cited one other source of State control over district attorneys: the courts' power to supervise court proceedings.[50] This power, however, is equally applicable to all persons who appear in court; and it is plainly limited to the district attorney's prosecution function. The other potential means of "control" cited by the DA's Office - *e.g.*, impeachment, legislative acts, funding mandate, reporting requirement - similarly do not represent any meaningful practical restraint on the district attorney's autonomy from the Commonwealth. *Cf. Hess*, 513 U.S. at 61-62 (O'Connor, J., dissenting) ("The critical inquiry . . . should be whether and to what extent the elected state government exercises oversight over the entity.

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[49] Moreover, the supersedure authority provided by New Jersey law is much more extensive than the limited supersedure under Pennsylvania law, in that it permits the AG broadly to supersede county prosecutors, leaving the prosecutors to "exercise only such powers and perform such duties as are required of them by the Attorney General." N.J. Stat. Ann. § 52:17(b)-106, quoted in *Coleman*. We held that even such a broad statutory supersedure scheme "provides county prosecutors . . . with a substantial degree of autonomy from the state government" in non-prosecutorial matters. *Coleman*, 87 F.3d at 1502.

[50] *See Carter*, 4 F. Supp. 2d at 392.

. . . . The inquiry should turn on real, immediate control and oversight rather than on the potentiality of a state taking action to seize the reins.");[51] *Fitchik*, 873 F.2d 663 (evaluating autonomy in terms of independence from "supervision or control").

The limited state powers[52] relied upon by the District Court and the DA's Office clearly do not extend to control over the district attorney's office administration in general, or over training, supervision and discipline of assistant district attorneys and police officers in particular. If we should focus on the particular function at issue in determining status under state law, we should do so in determining autonomy as well. Moreover, even a substantial degree of control by the state would cause the autonomy factor to weigh only slightly in favor of according immunity. *See Fitchik*, 873 F.2d at 664 ("Since the degree of control . . . is fairly substantial, we think that this factor counsels *slightly* in favor of according immunity . . . .") (emphasis added). *See also Christy*, 54 F.3d at 1149 ("[T]he significant control the Commonwealth exercises through the power to appoint all the members of the Commission weighs *slightly* in favor of Commission immunity. . . .") (emphasis added).

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[51] Justice O'Connor viewed the state's power to appoint and remove an agency's officers, to veto its actions, to receive its annual reports, and to approve or disapprove each of its rules and projects as evidence of the type of authority which would support a finding of immunity. *Id.* at 63.

[52] The power of the legislature (and to a lesser extent the courts) over the DA's Office is of course not narrowly limited; but "autonomy" would be a meaningless concept if it were rendered inapplicable by subjection to the (unexercised) legislative and judicial powers, to which all persons are subject.

Balancing - In balancing the *Fitchik* factors, the District Court concluded that although the first factor weighed against immunity, the remaining factors weighed "strongly in favor of finding that the District Attorney's Office, when performing its historic functions of investigating and prosecuting crimes on behalf of the Commonwealth, is an 'arm of the state' not subject to suit in federal court without its consent." *See Carter*, 4 F. Supp. 2d t 393. Because, as explained above, the District Court misapplied the second and third factors, it erred in the balancing as well.[53]

In *Fitchik*, we found that the non-applicability of state funds outweighed the combination of an ambiguous status under state law that balanced slightly in favor of immunity together with "fairly substantial" state control over the agency. *See also Christy*, 54 F.3d at 1150 (finding that balance is "clearly struck" against immunity where funding factor weighed against, and only one factor - autonomy -

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[53] *Cf. Hess*, 513 U.S. at 47 (stating that when indicators of immunity point in different directions, the court is guided primarily by the Eleventh Amendment's twin reasons for being: the State's dignity and their financial solvency). A suit for damages against a district attorney's office does not implicate the dignity of the state. The federal courts' consideration of status and autonomy under state law preserves the state's dignity by making its chosen structures controlling. Here, even if there is some doubt as to the entity's status under the law, and even if there is some degree of control by the state, the status and control do not rise to the level at which the exercise of judicial power over the DA' s Office would offend the dignity of the State.

weighed slightly in favor).[54] Here the funding factor weighs more heavily against immunity than in *Fitchik* and *Bolden*; the claim of state entity status under state law appears substantially weaker than in those cases in view of the express designation as a county official under constitutional, statutory and case law; and, at least for practical purposes, the autonomy of the DA's Office is greater than that of the transit authorities in those cases. Accordingly, as in *Bolden*, "[s]ince we are not prepared to overrule *Fitchik*, it follows that [the DA's Office] is not protected by the Eleventh Amendment." 953 F.2d at 821.[55]

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[54] An illuminating comparison of circumstances in which we have found extension of immunity and those in which we have not appears in *Bolden*, 953 F.2d 815-16. We there observed that we found immunity where we concluded that the state intended the agency be considered a state agency for Eleventh Amendment purposes, the state was obligated to meet the agency's liabilities, the agency's commissioners were appointed by the state, and the state retained substantial power over the agency's actions. *Port Auth. Police Benevolent Assoc. v. Port Auth. of N.Y. and N.J.*, 819 F.2d 413 (3d Cir. 1987). On the other hand, we refused to find immunity where an agency was state-created and largely state-funded but was "independent" and "direct[ed] its own actions" and was "responsible on its own for judgments resulting from [its] actions." *Kovats v. Rutgers*, 822 F.2d 1303, 1312 (3d Cir. 1987).

[55] We note that the DA's Office provides an impressive-looking list of cases to support the proposition that "Judges across the country have agreed, virtually without exception, that district attorneys are state officials protected by Eleventh Amendment immunity." It must be remembered, however, that the determinative factors of funding, state law status and autonomy will vary from state to state, so that decisions concerning other states' district attorneys provide very little guidance absent a comparison of

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IV. PROSECUTORIAL IMMUNITY

We must begin with "[t]he presumption . . . that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties" and the observation that the Supreme Court has been "quite sparing" in its recognition of absolute immunity. *Burns v. Reed*, 500 U.S. 478, 486-87 (1991).[56] We also note that the Supreme Court directs a "functional" approach to immunity issues, *id.*, and requires the official seeking absolute immunity to bear the burden of showing it is justified for the function in question, *see Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

With this guidance, we conclude that the alternative argument of the DA's Office that Carter's section 1983 claims should have been dismissed due to absolute prosecutorial immunity lacks merit, because Carter does not complain about conduct on the part of the DA's Office in the course of his prosecution. *See Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) (prosecutors are immune from suit under section 1983 for "initiating and pursuing a criminal prosecution"). None of the cases cited by the DA's Office extends

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those factors. The cited cases do not withstand such a comparison because they involved state funding, state supervision, and/or a state court determination that prosecutors were state officials. The DA's Office omits to mention cases in which the same courts of appeals have held district attorneys in other states within their jurisdiction to be *local* officials.

[56] *See also Schrob v. Catterson*, 948 F.2d 1402, 1409 (3d Cir. 1991).

this prosecutorial immunity to administrative, rather than prosecutorial, conduct.

Rather, as we have previously explained, "prosecutors are subject to varying levels of official immunity" and absolute prosecutorial immunity attaches only to "actions performed in a 'quasi-judicial' role," such as participation in court proceedings and other conduct "intimately associated with the judicial phases" of litigation. *Guiffre v. Bissell*, 31 F.3d 1241, 1251 (3d Cir. 1994) (quoting *Imbler*, 424 U.S. at 430).[57] "By contrast, a prosecutor acting in an investigative or administrative capacity is protected only by qualified immunity." *Id.* (citing *Imbler*, 424 U.S. at 431-31; *Burns*, 500 U.S. at 483-84 n.2, 111 S. Ct. at 1938 n.2).[58]

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[57] In *Imbler*, the Supreme Court held "only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983" and left open the question of whether absolute immunity would apply to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate" for the state. 424 U.S. at 430-31.

[58] In *Guiffre*, we followed the Supreme Court's holding in *Burns* that a prosecutor is not absolutely immunized for advice given to police during the investigative stages of a criminal proceeding. *See* 31 F.3d at 1253, citing *Burns*, 500 U.S. at 496.

In addressing the question left open in *Imbler*, and resolving a subsequent split among the courts of appeals, the *Burns* Court expressly rejected argument that a prosecutor's directory role in police investigations is sufficiently related to her advocate function. The Supreme Court explained that "[a]lmost any action by a prosecutor . . . could be said to be in some way related to the ultimate decision whether to prosecute, but we have never

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Qualified immunity protects official action "if the officer's behavior was 'objectively reasonable' in light of the constitutional rights affected." *Id.* If Carter succeeds in establishing that the DA's Office defendants acted with deliberate indifference to constitutional rights - as Carter must in order to recover under section 1983, then *a fortiori* their conduct was not objectively reasonable.

V. FAILURE TO STATE A CLAIM UNDER SECTION 1983

As the District Court observed, the standard for personal liability under section 1983 is the same as that for municipal liability. *See Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989). That standard was enunciated in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978): "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983." Where, as here, the policy in question

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indicated that absolute immunity is that expansive." *Burns*, 500 U.S. at 495. The Court also rejected the government's argument that adequate checks on prosecutorial misconduct in this context exist, observing that "one of the most important . . . checks, the judicial process, will not necessarily restrain a prosecutor's out-of-court activities that occur prior to the initiation of a prosecution." *Id.* Thus, it concluded that neither common law nor policy considerations support an extension of absolute immunity, which applies "only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Id.* at 494.

concerns a failure to train or supervise municipal employees, liability under section 1983 requires a showing that the failure amounts to "deliberate indifference" to the rights of persons with whom those employees will come into contact. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

The Court in *Canton* observed that failure to train may amount to deliberate indifference where the need for more or different training is obvious, and inadequacy very likely to result in violation of constitutional rights. *See id.* at 389. For example, if the police often violate rights, a need for further training might be obvious. *See id.* at 390 n.10. *See also Sample*, 885 F.2d at 1118 (deliberate indifference may be established where harm occurred on numerous previous occasions and officials failed to respond appropriately, or where risk of harm is great and obvious).

Once again, the factually similar *Walker* case is instructive. The *Walker* court analyzed *Canton*'s discussion of the deliberate indifference requirement and formulated a three-part test: in order for a municipality's failure to train or supervise to amount to deliberate indifference, it must be shown that (1) municipal policymakers know that employees will confront a particular situation;[59] (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights. *See Walker*, 974 F.2d at 297-98.

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[59] Although the *Walker* Court, adopting language from *Canton*, indicated that the policymaker's knowledge should be "to a moral certainty," it does not appear that this qualifying phrase adds anything other than emphasis to the requirement of ordinary knowledge.

In the present case, as in *Walker*, elements (1) and (3) are plainly met: "city policymakers know to a moral certainty that police officers will be presented with opportunities to commit perjury or proceed against the innocent. Moreover, a failure by police officers to resist these opportunities will almost certainly result in deprivations of constitutional rights." *Id.* at 299. As for element (2), although it may usually be appropriate to assume employees will obey their oaths and the perjury laws, "where there is a history of conduct rendering this assumption untenable, city policymakers may display deliberate indifference by doing so." *Id.* at 300.

The Court of Appeals concluded that "Walker should be allowed to pursue discovery in order to determine whether there was a practice of condoning perjury (evidenced perhaps by a failure to discipline for perjury)[60] or a pattern of police misconduct sufficient to require the police department to train and supervise police officers to assure they tell the truth." *Id.* The same result should apply to Carter.[61]

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[60] *Cf. Gentile*, 926 F.2d at 152 n.5 (predicating liability on "long history of negligent disciplinary practices regarding law enforcement personnel . . . .").

[61] If Carter is able to demonstrate that the DA's failure to adopt a policy amounts to deliberate indifference, he must of course then establish that his conviction was "actually caused" by that failure. *Canton*, 489 U.S. at 391; *see also Sample*, 885 F.2d at 1118 (requiring plaintiff to prove his injury "resulted from" the failure to adopt a policy). The *Canton* Court explained that actual causation turns on whether "the injury [would] have been avoided had the employee been trained under a program that was not deficient in the identified respect." 489 U.S. at 391.

The District Court's insistence that Carter must identify a particular policy and attribute it to a policymaker, at the pleading stage without benefit of discovery, is unduly harsh.[62] Carter is not engaged in a mere fishing expedition. Carter alleges that he spent ten years in prison as a result of a pervasive pattern of egregious, unconstitutional conduct by Philadelphia's police. He surmises, reasonably, that such misconduct reflects inadequate training and supervision. He cannot be expected to know, without discovery, exactly what training policies were in place or how they were adopted.[63]

VI.

We hold that (1) the Philadelphia District Attorney's Office is a local agency not within the Commonwealth's Eleventh Amendment immunity for purposes of claims arising from administrative and policymaking - rather than prosecutorial - functions; (2) the official capacity claims are not alternatively barred by absolute prosecutorial immunity; and (3) the personal capacity claims have been adequately pled. Accordingly, we will reverse the District Court's dismissal of Carter's claims against the DA's Office and remand for further proceedings.

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[62] The District Court read the Complaint as asserting only passive adoption by the DA's Office defendants of a policy imposed by the City. *See Carter*, 4 F. Supp. 2d at 394-95. Nonetheless, an appropriately generous reading would indicate that the DA's Office defendants were the policymakers who adopted the inadequate training, supervision and discipline policies on behalf of the City.

[63] *Cf. Gentile* 926 F.2d at 152 ("Plaintiffs were not obliged to produce particular evidence that defendants had specific knowledge of a declared policy of the County . . . .").

A True Copy:
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for the Third Circuit

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May 7, 1999

West Publishing Co.
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RE: Carter v. City of Philadelphia, et al.
No. 98-1581

Dear Publisher:

The attached corrections should be made to the slip opinion which was filed on April 28, 1999 in the above-entitled case.

Very truly yours,
P. DOUGLAS SISK, CLERK

/s/
Debra Ruh
Case Manager
Direct Dial 597-3144

cc: Commerce Clearing House
Lexis
U.S. Law Week
Robert W. Small, Esq.
David R. Walk Jr., Esq.
Marcia Berman, Esq.
Calvin R. Koons, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1581

Re: Carter v. City of Philadelphia, et al.

The following modifications have been made to the Court's Opinion issued on April 28, 1999 in the above-entitled appeal and will appear as part of the final version of the opinion:

Page 2 [App. 4], after "Susan F. Burt, Esquire" delete "Berlinger & Small"

Page 6, line 6 [App. 9, line 11], after "Office" insert "pursuant to Fed. R. Civ. P. 12(b)(6)"

Page 12, third line of the first full paragraph [App. 19, line 11], after "reasons" insert "-- explaining how it balanced the competing concerns that inform our interpretation of Rule 54(b) --"

Page 13, in the third paragraph, line 4 [App. 20, line 15], change the year from "1985" to "1995"

Page 25, line 7 of the first full paragraph [App. 36, line 14], delete "prosecution" and insert "litigation"

Page 26, n.53, line 3 [App. 38, n.53, line 4], "States'" should be "states'" and again at the end.

Page 28, last line on page [App. 41, line 13], delete "11 [sic] S. Ct. at 1938 n.2"

Page 29, next to last line of first paragraph after "1983" [App. 42, line 6], the comma should be deleted and a hyphen inserted.

Page 31, n.61 [App. 44], add the following sentence at the end: "To the extent that Carter's claims are predicated on inadequate training, supervision or discipline of police officers (as opposed to assistant district attorneys), Carter will be required to establish sufficient de juen or de facto control by the defendants to supporting a finding of causation.

Very truly yours,

/s/ P. Douglas Sisk, Clerk

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, 19106-1790
May 14, 1999

TELEPHONE
215-597-2995

West Publishing Company
Editorial Department - D3
610 Opperman Drive
Eagan, MN 55123

Docket No: 98-1581
Re: Carter v. City of Philadelphia

Dear Publisher:

Enclosed herewith are corrections to be made to the opinion filed on April 28, 1999, in the above-entitled case.

Please acknowledge receipt of same on the enclosed copy.

Thank you for your cooperation.

Very truly yours,
P. DOUGLAS SISK, CLERK

/s/
Debra Ruh
Case Manager
Direct Dial 597-3144

cc: Lexis
U.S. Law Week
Commerce Clearing House
Robert W. Small, Esq.
Marcia Berman, Esq.
R. David Walk Jr., Esq.
Calvin R. Koons, Esq.
Stuart Suss, Esq.
Paul A. Tufano, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1581

Re: Carter v. City of Philadelphia, et al.

The following modifications have been made to the Court's Opinion issued on April 28, 1999 and to the prior corrections noted in the above-entitled appeal and will appear as part of the final version of the opinion:

Page 31, n.61 [App. 44], add the following sentence at the end:"To the extent that Carter's claims are predicated on inadequate training, supervision or discipline of police officers (as opposed to assistant district attorneys), Carter will be required to establish sufficient de jure or de facto control by the defendants to supporting a finding of causation.

In the prior corrections "de jure" had been incorrectly spelled due to a typographic error.

Very truly yours,

/s/ P. Douglas Sisk, Clerk

Dated: May 14, 1999

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 28, 1999

No. 98-1581

RAYMOND CARTER, Appellant
v.
CITY OF PHILADELPHIA, et al.
(E.D. PA. No. 97-cv-04499) (BWK)

Present: MANSMANN, Circuit Judge.

1. **Motion filed by Appellee Richard Roe to Stay Mandate Pending Petition for Writ of Certiorari.**

2. **Response by Appellant to Above Motion.**

/s/
Debra Ruh
Case Manager
Direct Dial 597-3144

The Opinion and Judgment Order in this appeal was filed on 4/28/99.
Any response to the above motion due 7/8/99, will be forwarded upon receipt.
Mandate did not issue since motion received.
Petition for Rehearing was denied on 6/18/99.

ORDER

The foregoing motion is granted, and it is hereby stayed until August 24, 1999.

By the Court,

/s/
Carol Los Mansmann
Circuit Judge

Dated: July 15, 1999

DR/CC: RWS
SS
MB
RDW
EBZ

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 30, 1999

No. 98-1581

RAYMOND CARTER, Appellant
v.
CITY OF PHILADELPHIA, et al.

Present: MANSMANN, Circuit Judge.

O R D E R

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 17, 1999.

/s/ Carol Los Mansmann
Circuit Judge

Dated: August 11, 1999

DR/CC: RWS
MB
RDW
EBZ
CRK
SS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1581

RAYMOND CARTER,

Appellant

vs.

CITY OF PHILADELPHIA; THOMAS RYAN, INDIVIDUALLY AND AS A POLICE OFFICER FOR THE CITY OF PHILADELPHIA; JOHN DOE, AN UNKNOWN POLICE OFFICER(S) AND OR DETECTIVE(S) FOR THE CITY OF PHILADELPHIA, LYNNE ABRAHAM, PHILADELPHIA DISTRICT ATTORNEY IN HER OFFICIAL CAPACITY; RICHARD ROE, POLICE OFFICER REPRESENTING UNKNOWN EMPLOYEES OF THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY; WAYNE SETTLE, INDIVIDUALLY AND AS A POLICE OFFICER FOR THE CITY OF PHILADELPHIA; MICHAEL DUFFY, INDIVIDUALLY AND AS A POLICE OFFICER FOR THE CITY OF PHILADELPHIA

Present: BECKER, Chief Judge,
SLOVITER, STAPLETON, MANSMANN, GREENBERG,
SCIRCIA, NYGAARD, ALITO, ROTH AND LEWIS.
Circuit Judges.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

June 18, 1999
DR/CC: RWS
MB
RDW
EZ
CRK
SS

Raymond CARTER, Plaintiff,

v.

CITY OF PHILADELPHIA, et al., Defendants.

Civil Action No. 97-CV-4499.

United States District Court, E.D. Pennsylvania.

April 20, 1998.

Arrestee filed complaint against city, police officers, and unidentified employees of District Attorney's office after arrestee's conviction was vacated on appeal. District Attorney's office moved to dismiss for failure to state claim against unidentified employees. The District Court, Kauffman, J., held that: (1) Eleventh Amendment barred action against employee in his official capacity, and (2) arrestee failed to state § 1983 claim against employee in his individual capacity.

Motion to dismiss granted.

1. Federal Civil Procedure West Key Number 1835

On a motion to dismiss for failure to state a claim, legal conclusions, deductions, or opinion couched as factual allegations are not given a presumption of truthfulness. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Federal Courts West Key Numbers 265, 269

The Eleventh Amendment encompasses not only suits in which a state is a named defendant, but also suits brought

against state agents and state instrumentalities. U.S.C.A. Const.Amend. 11.

3. Federal Courts West Key Number 269

The Eleventh Amendment bars federal suits against state official acting in their official capacities. U.S.C.A. Const.Amend. 11.

4. Federal Courts West Key Number 418

Whether an agency is an "arm of the state" under the Eleventh Amendment is a question of federal law. U.S.C.A. Const.Amend. 11.

5. Federal Courts West Key Number 269

In determining whether an agency is an "arm of the state" under the Eleventh Amendment, the court must consider three factors: (1) whether, in the event the plaintiff prevails, the payment of the judgment would come from the state; (2) the status of the agency under state law; and (3) what degree of autonomy the agency enjoys. U.S.C.A. Const.Amend. 11.

6. Federal Courts West Key Number 271

District attorney's offices in Pennsylvania counties are immune from suit in federal court under Eleventh Amendment, regardless of whether office is prosecuting cases or developing policies to govern such prosecutions; district attorney acts on behalf of state, and district attorney's office acts free from interference by city in conducting criminal prosecutions. U.S.C.A. Const.Amend. 11; 16 P.S. § 1402(a); 71 P.S. § 732-205(a)(4).

7. Federal Courts West Key Number 269

In deciding Eleventh Amendment questions with respect to some government officials, courts must look more

specifically at the office's particular function at issue in the case. U.S.C.A. Const. Amend. 11.

8. District and Prosecuting Attorneys West Key Number 1

Under Pennsylvania law, the District Attorney is the sole public official charged with the legal responsibility of conducting in court all criminal and other prosecutions, in the name of the Commonwealth.

9. Federal Courts West Key Number 271

All members of Pennsylvania's Unified Judicial System are state entities protected by the Eleventh Amendment. U.S.C.A. Const.Amend.11.

10. Federal Courts West Key Number 269

The Eleventh Amendment does not immunize State officials for actions taken in their individual capacities. U.S.C.A. Const. Amend. 11.

11. District and Prosecuting Attorneys West Key Number 10

Absolute prosecutorial immunity extends to allegations that a prosecutor knowingly utilizes perjured testimony in obtaining a conviction. 42 U.S.C.A. § 1983.

12. Civil Rights West Key Number 207(2)

To hold a public official liable for a civil rights violation under a theory of supervisory liability, plaintiff must identify a particular policy, attribute that policy to the official himself, and then establish a causal link between the execution of that policy and the injury he allegedly suffered. 42 U.S.C.A. § 1983.

13. Civil Rights West Key Number 207(2)

To establish § 1983 liability under a theory of supervisory liability, the "deliberate indifference" of a municipal policy maker may be established in two ways: (1) where the harm in question occurred on numerous previous occasions and municipal officials failed to respond appropriately; and (2) where the risk of harm is so great and so obvious that the failure of the policy maker to respond would amount to deliberate indifference in itself. 42 U.S.C.A. § 1983.

14. Civil Rights West Key Number 207 (2)

Arrestee failed to state § 1983 claim against unidentified assistant attorney in his individual capacity for supervisory liability based on theory of failure to train; complaint clearly alleged that city, not policies of assistant district attorney, was responsible for policies leading to arrestee's conviction. 42 U.S.C.A. § 1983.

Richard W. Berlinger, Robert W. Small, Berlinger & Small, Abington, PA, Susan F. Burt, Frank Finch, III, Phila, PA, for Raymond Carter.

Shelley R. Smith, Asst. City Solicitor, City of Phila. Law Dept., Phila, PA, for City of Philadelphia, Thomas Ryan, John Doe, Wayne Settle, Michael Duffy.

Eric B. Henson, Hoyle, Morris & Kerr, Phila, PA, Shelley R. Smith, Asst. City Solicitor, City of Phila Law Dept., Phila, PA, for Lynne Abraham.

Eric B. Henson, Hoyle, Morris & Kerr, Phila, PA for Richard Roe.

MEMORANDUM OPINION

Kauffman, District Judge.

The Philadelphia District Attorney's Office has moved pursuant to Rule 12 (b)(6) to dismiss all Counts of the Amended Complaint brought against defendant Richard Roe ("Roe").[1] Roe was named by plaintiff Raymond Carter ("Carter") both in his official and individual capacities. For the reasons set forth below, this Court finds that the official capacity claims against Roe are barred because, when performing its investigatory and prosecutorial functions, the District Attorney's Office is an arm of the State protected from suit in federal court by the Eleventh Amendment. The Court also concludes that Carter's individual capacity claims against Roe fail to state a claim under 42 U.S.C. § 1983. Accordingly, the District Attorney's Motion to Dismiss all claims against Roe is **GRANTED.**

I. *BACKGROUND*

On September 26, 1997, Carter filed an Amended Complaint against Roe, the City of Philadelphia, three Philadelphia Police officers - Thomas Ryan, Wayne Settle, and Michael Duffy - and a fourth, unidentified "John Doe" employee of the Philadelphia Police Department. Carter has sued all of the individual defendants, identified and unidentified, in both their official and individual capacities.

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[1] Although the Amended Complaint identifies Roe as a multiple unknown "employees of the District Attorney's Office," for the sake of clarity the Court will refer collectively to these unidentified defendants as "Roe."

Carter alleges that following the September 18, 1986 barroom murder of a Robert Harris, Officer Thomas Ryan of the 39th Precinct introduced Settle, Duffy, Doe and Roe to Pamela Jenkins, a woman with whom Ryan allegedly had a longstanding relationship. The Amended Complaint identifies Settle, Duffy, Doe and Roe as "the Homicide Detectives investigating the Harris murder." [Compl. ¶¶ 11,12].[2]

Officer Ryan allegedly paid Jenkins an unspecified sum of money to inform the "homicide detectives" that she had witnessed Carter shoot Harris and to so testify at Carter's trial. [Compl. ¶ 13]. Carter contends that because of defendants' alleged failure to investigate the information provided by Jenkins, he was wrongly convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole. [Compl. ¶¶ 15-17].

Following a 1996 post-conviction hearing, the Philadelphia Court of Common Pleas found that Jenkins' status as a paid informant had not been disclosed to Carter. Even though the Court found that the District Attorney's Office was not aware that Jenkins had been paid, it nevertheless concluded that the failure to disclose violated the Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and ordered a new trial. In vacating Carter's conviction, however, the Court expressly noted on the record that it ***had not*** found Carter to be innocent of the Harris murder. On December 30, 1996, following the District Attorney's decision to *nolle prosse* the case

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[2] The Complaint identifies Roe as both a homicide detective and as multiple unknown employees of the District Attorney's Office. For the purpose of this analysis, the Court will consider Roe to be the latter. *See* fn.1, *supra*.

without prejudice, Carter was released from prison. [Compl. ¶ 19].

Carter now claims that his conviction was "proximately caused by the following policies, practices, customs or usages of the ***City*** as adopted by its duly authorized agents":

a. Failure to train the City's police officers in the use of paid informants in homicide cases;

b. Failure to monitor and/or investigate the use of paid informants as trial witnesses in homicide cases;

c. Failure to provide the Police Department or the Office of District Attorney adequate funding to investigate corruption by police officers in procuring and providing tainted evidence to the Office of District Attorney for use in homicide cases;

d. Failure to discipline or prosecute known incidents of police officers procuring and providing to the District Attorney's Office tainted evidence for use in homicide prosecutions;

e. Refusing to investigate or inadequately investigating complaints of the use of tainted evidence in homicide prosecutions;

f. Concealing or withholding from those wrongfully arrested, convicted and/or imprisoned in homicide cases information known to the City which would enable such wrongfully arrested, convicted and imprisoned persons to secure

post-conviction relief.

[Compl. ¶ 20 (emphasis added)].
Carter asserts that these alleged policies of the City "were unconstitutional or, if constitutional, were deliberately indifferent to the constitutional and other rights of Carter and others similarly situated." [Compl. ¶ 21]. Based on these allegations, the Amended Complaint purports to state causes of action against Roe, in his official and individual capacities, under 42 U.S.C. § 1983 (Count I), 42 U.S.C. § 1985 (Count II),[3] Article 1, §§ 1, 9, 13 & 26 of the Pennsylvania Constitution (Count III), and state law claims for abuse of process (Count IV), malicious use of process (Count V), false arrest (Count VI), false imprisonment (Count VII), invasion of privacy (Count VIII), and negligent infliction of emotional distress (Count IX).

II. *Discussion*

A. *The Standard of Review*

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). In considering a Rule 12(b)(6) motion, the Court must accept as true the complaint's well-pleaded allegations and view them in the light most favorable to the plaintiff. *Scheurer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must also accept as true any reasonable inferences that can be derived from the facts alleged in the complaint.

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[3] Carter has voluntarily withdrawn his claims under 42 U.S.C. § 1985.

Oshiver, v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 (3d Cir. 1994)

[1] This advantage is not absolute, however, and "legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *Plater-Zyderk v. Abraham*, 1998 WL 67545, at *3 (E.D. Pa. Feb 17, 1998) (Hutton, J.) (quoting *Government Guarantee Fund v. Hyatt Corp.*, 955 F.Supp. 441, 448 (D.Vi. 1997)). *See also* Wright & Miller, *Federal Practice & Procedure* § 1357 (2d ed.1997). The Court may only grant the motion if, after viewing the complaint in the light most favorable to the plaintiff, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" under the applicable law. *Plater-Zybert*, 1998 WL 67545, at *3 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

B. *When Performing Its Investigatory And Prosecutorial Function, The District Attorney's Office Is An Arm Of The State For Eleventh Amendment Considerations.*

Carter's "official capacity" § 1983 action against Roe must be treated as a claim against the District Attorney's Office itself. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.ED.2d 301 (1991) ("official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent") (internal quotation marks omitted). In moving for dismissal of the official capacity claims against Roe, the District Attorney's Office argues that it is immune from suit in federal court under the Eleventh Amendment to the United States Constitution.

Ratified in February, 1795, the Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S.C.A. Const., Amend. XI.[4]

[2,3] The Eleventh Amendment's reference to suits "against one of the United States" encompasses not only suits in which a state is a named defendant, but also suits brought against state agents and state instrumentalities, which are frequently described as "arms of the state." *Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 903, 137 L.Ed.2d 55 (1997) (citing *Poindexter v. Greenhow*, 114 U.S. 270, 287, 5 S.Ct. 903, 29 L.Ed. 185 (1885); *Ex Pater Ayers*, 123 U.S. 443, 487, 8 S.Ct. 164, 31 L.Ed. 216 (1887); *Smith v. Reeves*, 178 U.S. 436, 438-39, 20 S. Ct. 919, 44 L.Ed. 1140 (1900); *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945)). The Eleventh Amendment also bars federal suits against state officials acting in their official capacities. *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) ("The Court has held that, absent waiver by the State or valid congressional override, the Eleventh

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[4] The Eleventh Amendment has been construed to immunize an unconsenting state "from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Hans v. Louisiana*, 134 U.S. 1, 11-12, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

Amendment bars a damages action against a State in federal court. This bar remains in effect when State officials are sued for damages in their official capacity.") (citations omitted). "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. It thus accords the States the respect owed them as members of the federation." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) (citations omitted).[5]

[4,5] Whether the District Attorney's Office, when performing its investigatory and prosecutorial functions is an "arm of the state" under the Eleventh Amendment is a question of federal law. *Blake v. Kline*, 612 F.2d 718, 722 (3d Cir. 1979). In making that determination, this Court must consider three factors:

> (1) whether, in the event the plaintiff prevails, the payment of the judgment would come from the state...;
>
> (2) the status of the agency under state law...; and
>
> (3) what degree of autonomy the agency enjoys.

Christy v. Pennsylvania Turnpike Comm., 54 F.3d at 1144-1145 (citing *Peters v. Delaware River Port Auth.*, 16 F.

---

[5] The Eleventh Amendment was intended to reaffirm the Framer's original understanding that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15, 10 S.Ct. 504, 33 L.Ed. 842 (1890)).

3d 1346, 1350 (3d Cir. 1994); *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 816 (3d Cir. 1991) (*en banc*)).

(1) *Source of Funding*

[6] No single factor is dispositive of the Eleventh Amendment analysis. Ordinarily, however, most courts have held that the "most significant" factor is whether a judgment against the District Attorney's Office would be paid out of the state treasury.[6] *Fitchik v. New Jersey Transit Rail Operations, Inc.* 873 F. 2d 655, 659 (3d Cir. 1989) (*en banc*). The District Attorney's Office acknowledges that, because the majority of its funding comes from the City, this factor weighs against a finding of Eleventh Amendment immunity. *Cf. Robinson v. Court of Common Pleas of Philadelphia County*, 827 F.Supp. 1210, 1214-16 (E.D.Pa. 1993) (Ludwig, J.) (finding Philadelphia Common Pleas Court entitled to Eleventh Amendment immunity despite fact that any judgment would be paid by City.)

(2) *Status under State Law*

It would be hard to imagine functions more essential to the sovereignty of state government that the investigation and prosecution of state criminal charges. Prior to 1850, the Attorney General of the Commonwealth was empowered to perform those critical functions. In practice, however, he appointed deputy attorneys general for the counties to

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[6] While the importance of the funding factor is often repeated, the Eleventh Amendment refers to suits both at law and in equity. *Pennhurst*, 465 U.S. at 100, 104 S.Ct. 900.

perform them. *Commonwealth ex rel. Specter v. Freed*, 424 Pa. 508, 512, 228 A.2d 382, 383-84 (1967).

In 1850, the General Assembly transferred the duties of the appointed deputy attorneys general to a "district attorney" elected by the voters of each county. *Freed*, 228 A.2d at 384. See also *Commonwealth ex rel. Specter v. Bauer*, 437 Pa. 37, 40, 261 A.2d 573, 575 (1970). The statute creating the office of district attorney, as amended, established beyond any doubt that the District Attorney's Office functions as an arm of the Commonwealth when performing its investigative and prosecutorial duties:

> The district attorney shall sign all bills of indictment and conduct in court all criminal and other prosecutions, ***in the name of the Commonwealth***, or, when the Commonwealth is party, which arise in the county for which he is elected, ***and perform all the duties which, prior to May 3, 1850, were performed by deputy attorneys general.*** The duties herein conferred shall be in addition to all other duties given to the said district attorney by other statutes.

16 P.S. § 1402(a) (emphasis added).

The Pennsylvania Supreme Court has held that "[i]f this statute means anything at all, it means that district attorneys in the Commonwealth have the power - and the duty - to represent the Commonwealth's interests in the enforcement of its criminal laws." *Bauer*, 261 A.2d at 575 (recognizing District Attorney's "historical duty of representing the Commonwealth's interest in the enforcement of its criminal laws").

Pennsylvania's Commonwealth Court has also concluded that when investigating and prosecuting crimes, the district attorneys of each county "perform sovereign functions of state government." *Pennsylvania Gamefowl Breeders Assoc. v. Commonwealth*, 122 Pa. Commw. 52, 56, 551 A.2d 361, 363 (1988). See also *Commonwealth v. DiPasquale*, 431 Pa. 536, 540-41, 246 A.2d 430, 432 (1968) ("A District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case."); *Harris v. Pernsley*, 820 F.2d 592, 598 (3d Cir.1987).

[7] "In deciding Eleventh Amendment questions with respect to some government officials, ... courts must look more specifically at the office's particular function at issue in the case." *Bibbs v. Newman*, 997 F.Supp. 1174, 1178, (S.D. Ind. 1998) (citing *McMillian v. Monore County, Alabama*, 520 U.S. 781, ___, 117 S.Ct. 1734, 1737, 138 L.Ed.2d 1 (1997)). In *McMillian*, the Supreme Court adopted a functional analysis in determining whether a county Sheriff was a state or local official for the purpose of § 1983 liability in a case, such as the present, involving allegations of wrongful arrest and prosecution. The *McMillian* Court held that the issue of the Sheriff's status could not be determined "in some categorical, 'all or nothing' manner," but only by asking whether the Sheriff "represents the State or the county **when he acts in a law enforcement capacity,**" 520 U.S. at ____, 117 S.Ct. at 1737 (emphasis added). See also *Coleman v. Kaye*, 87 F.3d 1491, 1505 (3d Cir. 1996) (utilizing functional analysis to determine that county prosecutor was acting as local official when making

employment decision, as opposed to when exercising prosecutorial function, when he acts as state official.[7]

McMillian's functional approach to the question of state or local status, as applied to locally elected prosecutors, is hardly novel. For example, in *Pusey v. City of Youngstown*, 11 F.3d 652 (6th Cir. 1993), the Sixth Circuit held that while a local prosecutor was a municipal employee, she was a ***state official*** not subject to suit under § 1983 when enforcing state criminal law:

> While we agree with the parties that Cronin is employed by the City of Youngstown, we nevertheless conclude that plaintiff's suit must fail as Cronin **acted on behalf of that state when she was prosecuting state criminal charges** and reduced the charge at the September 27, 1991 hearing. City prosecutors are responsible for prosecuting state criminal charges. *See* Rev. Code §§ 1901.34 (C), 309.08. Clearly, state criminal laws and state victim impact laws represent the policy of the state. **Thus, a city official pursues her duties as a state agent when enforcing state law or policy**. *Cf. Scott v.*

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[7] The Coleman Court held:

> The fact that the prosecutor "[i]n his county...is the foremost representative of the executive branch of government in the enforcement of the criminal law" is not disputed here. *State v. Winne*, 12 N.J. 152, 96 A.2d 63, 72 (1953). What we must address is the county prosecutor's role in the promotion process on the local level, an issue **separate and apart** from the prosecutor's well-recognized executive investigatory and prosecutorial functions.

87 F.3d at 1505 (emphasis added).

> *O'Grady*, 975 F.2d 366 (7th Cir. 1992); *Echols v. Parker*, 909 F.2d 795 (5th Cir. 1990). Because Cronin acts as a state agent when prosecuting state criminal charges, the suit against Cronin in her official capacity is to be treated as a suit against the state. Again, a suit against a state is not cognizable under 42 U.S.C. § 1983. *Will* [*v. Michigan Department of State Police*], 49 U.S. [58] at 71, [109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)].

11 F.3d at 657-58 (emphasis added). *See also Esteves v. Brock*, 106 F.3d 675, 677-78 & n.8 (5th Cir. 1997) (although district attorney was locally elected, "[a]s a state officer acting in her official capacity, [district attorney] is protected by the Eleventh Amendment from suit under § 1983 for money damage"); *Arnold v. McClain*, 926 F.2d 963, 966 (10th Cir. 1991) (district attorney entitled to Eleventh amendment immunity even though elected by voters of two counties); *Owens v. Fulton County*, 877 F.2d 947, 951 (11th Cir. 1989); *Scott v. O'Grady*, 975 F.2d 366, 371 (7th Cir. 1992) ("[W]hen a county sheriff in Illinois performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official and does not get the benefit of the Eleventh Amendment. But this conclusion does not end our inquiry... The county sheriff acts as an arm of the Illinois state judicial system in executing Writs of Assistance and other state court orders. When fulfilling this statutory duty, the sheriff and his deputies must be deemed state officials for the purposes of Eleventh Amendment immunity."); *Bibbs*, 997 F.Supp. at 1178.[8]

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[8] Carter places much emphasis on Article 9,§ 4 of Pennsylvania's Constitution, which defines district attorneys as county

(Continued)

(3) *Autonomy*

[8] "The District Attorney of Philadelphia County, no less than district attorneys in any other county of this Commonwealth, is the sole public official charged with the legal responsibility of conducting in court all criminal and other prosecutions, in the name of the Commonwealth." *Commonwealth ex rel. Specter v. Bauer*, 437 Pa. 37, 42, 261 A.2d 573, 576 (1970). Thus, when the District Attorney's Office conducts criminal prosecutions, it acts free from interference by and autonomously from the City. *See Commonwealth ex rel. Specter v. Freed*, 424 Pa. 508, 512, 228 A.2d 382, 383 (1967) ("neither the Constitution nor the statutes of this Commonwealth have ever granted Philadelphia or any other political subdivision of Pennsylvania authority to alter or interfere with the district attorney's conduct of law enforcement activities").

[9] While the District Attorney's Office is not subject to local control in performing its investigatory and prosecutorial functions, the Attorney General with court approval has the statutory power to supersede a District Attorney's failure to prosecute a criminal offense. 71 P.S. § 732-205(a)(4) ("Supersession shall be ordered if the

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(Continued)

rather than state officers. PA. Const. art. 9 § 4 (Purdon's 1994). This provision, however, does not in any way affect the district attorney's function of investigating and prosecuting crimes in the name of the Commonwealth. After 1850, the prosecutorial function of the appointed deputy attorneys general was transferred to officials elected at the county level. Thus, this provision does not preclude the Court from concluding that when investigating and prosecuting crimes, the district attorneys are performing their traditional state function.

Attorney General establishes by a preponderance of the evidence that the [D]istrict [A]ttorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion). Even more significantly, the District Attorney's authority to conduct criminal prosecutions has always been subject to judicial oversight:

> A District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case. [citations omitted]. But this broad general power of a District Attorney is subject to the right and power of a Court (a) to provide generally for the orderly administration of criminal justice, including the right and power to supervise all trial and all Court proceedings, and (b) to protect all of a defendant's rights to a fair trial and due process under the Constitution of the United States and the Constitution of Pennsylvania.

Commonwealth v. DiPasquale, 431 Pa. 536, 540-41, 246 A.2d 430, 432 (1968). All members of Pennsylvania's Unified Judicial System, from the Supreme Court to traffic court, are state entities protected by the Eleventh Amendment. *See Robinson v. Court of Common Pleas of Philadelphia County*, 827 F.Supp. 1210, 1215 (E.D. Pa. 1993) (Ludwig, J.) (finding Philadelphia Common Pleas Court protected by Eleventh Amendment, even though adverse judgment would be paid by City).

Accordingly, although the first *Fitchik* factor indisputedly would weigh against a finding of Eleventh Amendment immunity, the inquiry does not stop there, and the second and third factors weigh strongly in favor of finding

that the District Attorney's Office when performing its historical functions of investigating and prosecuting crimes on behalf of the Commonwealth, is an "arm of the State" not subject to suit in federal court without its consent. The Court therefore concludes that Carter's claims against Roe in his official capacity are barred by the Eleventh Amendment to the United States Constitution.

In opposing dismissal, Carter argues that even if the District Attorney's Office was entitled to Eleventh Amendment immunity for actions arising from its prosecution of crimes, his claims are not based on the conduct of the District Attorney's Office in his own conviction, but rather on its failure to establish appropriate policies and procedures to detect and prevent the use of tainted or manufactured evidence in homicide cases.

In *Pitts v. County of Kern*, 17 Cal. 4th 340, 949 P.2d 920, 70 Cal. Rptr.2d 823 (1998), the California Supreme Court recently rejected a similar argument, concluding that the District Attorney was a state officer with respect to both prosecution ***and*** policy:

> [I]t logically follows that [the district attorney] also represents the state, and not the county, when training and developing policy in these areas. No meaningful analytical distinction can be made between these two functions. Indeed, a contrary rule would require impossibly precise distinctions. The district attorney would represent the state when he or she personally prepared to prosecute and prosecuted criminal violations of state law, but the county when training others to do so, or when developing related policies. Moreover, anytime the district attorney relied on a formal policy to handle a particular aspect of a case,

> that decision would be attributable to the county, even though the prosecution itself would be a state function. Such a result would be nonsensical, and would impose local government liability under the most arbitrary of circumstances.

70 Cal. Rptr.2d 823, 949 P.2d at 934-35.

This Court agrees, and, accordingly, concludes that regardless of whether the District Attorney's Office is prosecuting cases or developing the policies to govern such prosecutions, it is an arm of the State protected from suit in federal court by the Eleventh Amendment.

C. *Carter's Individual Capacity Claims Against Roe Fail To State A Cause Of Action Under § 1983.*

[10] The Eleventh Amendment does not immunize State officials for actions taken in their individual capacities. *Sullivan v. Barnett*, 139 F.3d 158, 179-180, 1998 WL 107983, at *21 (3d Cir. Mar. 13, 1998) (citing **Scheurer v. Rhodes**, 416 U.S. 232, 237-38, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). When prosecutors are sued under § 1983 in their individual capacities, however, they are entitled to invoke the absolute prosecutorial immunity set forth in *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

[11] Relying on common-law precedent and policy considerations, the *Imbler* Court held that "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution" was immune from suit under § 1983. *Imbler's* absolute immunity extends to allegations that a prosecutor knowingly utilized perjured testimony in obtaining a conviction. See *Siano v. Justices of*

Massachusetts, 698 F.2d (1st Cir. 1983) (prosecutor's absolute immunity extends to knowing use of forged evidence in obtaining criminal conviction); *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978) (§ 1983 suit alleging that state prosecutors had falsified lineup report and police tapes of incoming phone calls properly dismissed under *Imbler*); *Jones v. Shankland*, 800 F.2d 77 (6th Cir. 1986) (civil rights plaintiff convicted of murder but released from prison based on newly-discovered evidence had no cause of action against prosecutor even if prosecutor deliberately elicited perjured testimony to obtain conviction); *Tate v. Grose*, 412 F.Supp. 487 (E.D.Pa. 1976) (suit dismissed on basis of absolute immunity where state prosecutors allegedly used perjured testimony). Accordingly, Roe has absolute immunity for the conduct alleged here relating to Carter's prosecution.

Carter again argues, however, that his claims against Roe arise not from his prosecution, but from Roe's alleged role in formulating the policies and practices (or lack thereof) that ultimately resulted in his prosecution. [Compl. ¶ 20]. Construed in the light most favorable to Carter, the Amended Complaint could be read to include a claim for individual "supervisory" liability under § 1983. The same well-settled legal standards that govern a claim for municipal liability (as set forth in *Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and its progeny) apply in a § 1983 action brought against "supervisors" in their individual capacities for policy decisions. *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989) ("[T]he standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve."). Foremost, Roe cannot be held liable under §1983 on a *respondeat superior* theory of liability. *Slaughter v. City of Philadelphia*, 1995 WL

12060, *3 (E.D.Pa. Jan. 12, 1995) (Waldman, J.). Thus, unless Roe had a direct role in Carter's prosecution (in which case he would have complete immunity under *Imbler*), he cannot be held liable for the conduct of the assistant district attorneys who prosecuted Carter.

[12] Rather, to hold Roe liable under a theory of supervisory liability, Carter must identify a particular policy, attribute that policy to Roe himself, and then establish a causal link between the execution of that policy and the injury he allegedly suffered. *Losch v. Borough of Parkesburg*, 736 F.2d 903, 910 (3d Cir. 1984). In short, Carter must allege that the policies formulated by Roe were the "moving force of the constitutional violation." *Polk County v. Dodson*, 454 U.S. 312, 326,102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (quoting *Monell*, 436 U.S. at 694, 98 S.Ct. 2018).

Although failing to identify any specific policy that resulted in Carter's alleged injury, the Amended Complaint could be construed to allege that his injuries arose from the ***absence*** of a policy regarding the identification of paid informants. As such, Carter's claims against Roe are properly analogized to the "failure to train" cases arising under §1983, and should be governed by the principles set forth in those cases.

The United States Supreme Court has held that inadequate training procedures "may serve as the basis for §1983 liability only when the failure to train amounts to **deliberate indifference** to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (emphasis added). The Court explained that "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its

inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under §1983." 489 U.S. at 389, 109, S.Ct. 1197. The Court emphasized that in order to establish §1983 liability under this theory, the failure to train must "reflect [ ] a 'deliberate' or 'conscious' choice by [the] municipality." *Id.*

[13] The "deliberate indifference" of a municipal policy maker may be established in two ways: 1) where the harm in question occurred on numerous previous occasions and municipal officials failed to respond appropriately; and 2) where the risk of harm "is so great and so obvious" that the failure of the policy maker to respond would amount to deliberate indifference in itself. *Sample*, 885 F.2d at 1118. *See also Robinson v. Winslow Township*, 973 F.Supp. 461, 468 (D.N.J.1997).

[14] Even when read most favorably for Carter, the Amended Complaint falls far short of stating a claim for supervisory liability based on a failure to train theory against Roe in his individual capacity. The Amended Complaint clearly alleges that the **City** was responsible for the policies leading to Carter's conviction - **not** the policies of the still unidentified Roe. In short, a nebulous non-policy with respect to the use of paid informants, imposed by the City and passively "adopted" by some unknown policy making assistant district attorney is not sufficient to state a claim under §1983, even when the most liberal notion of pleading requirements are stretched virtually to their breaking point. *See Slaughter*, 1995 WL 12060, at *3 ("suing people on the hope that evidence to justify the claim might later be obtained is quite inconsistent with Fed.R.Civ.P. 11") (Waldman, J.).

III. *CONCLUSION*

When investigating or prosecuting a criminal act on behalf of the Commonwealth, the Philadelphia District Attorney's Office is an arm of the State for the purpose of Eleventh Amendment immunity from suit. Accordingly, Carter's §1983 action against Roe in his official capacity must be dismissed. The Amended Complaint also fails to state a claim against Roe in his individual capacity because it fails to allege facts sufficient to support any theory of recovery under §1983.

This court declines to exercise supplemental jurisdiction over the state law claims asserted by Carter against Roe in his individual capacity in Counts III through IX of the Amended Complaint. 28 U.S.C. §1367(c).

COMMONWEALTH OF PENNSYLVANIA
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January 15, 1999

P. Douglas Sisk, Clerk
United States Court of
Appeals for the Third Circuit
601 Market Street, Room 21400
Philadelphia, Pennsylvania 19106

RE: *Carter v. City of Philadelphia*, No. 98-1581

Dear Mr. Sisk:

I recently became aware of the above-referenced case and its potential impact upon the criminal justice system in Pennsylvania. The Governor wishes to join in the *amicus curiae* briefs submitted by the Pennsylvania Office of Attorney General and the Pennsylvania District Attorneys Association on behalf of Appellee Richard Roe, representing unknown employees of the Philadelphia District Attorney's Office.

As the chief executive of the Commonwealth of Pennsylvania, the Governor is required to "take care that the laws be faithfully executed." PA. CONST. ART. IV, §2. Among the most important laws of the Commonwealth is the Crimes Code, 18 Pa. C.S. §§ 101-9183. The Governor, therefore, has a keen interest in assuring that the criminal

laws of this Commonwealth, and the punishments imposed upon those who would commit crimes, are carried out in accordance with the law.

This case raises an important question of whether Pennsylvania's district attorneys, who are statutorily charged with representing the people of this Commonwealth in criminal prosecutions, are immune from suit in federal court under the Eleventh Amendment to the United States Constitution. In order to prevent improper federal intrusion on the Commonwealth's enforcement of its criminal laws, it is imperative that district attorneys in their capacity as state prosecutors have the same immunity that other state officials enjoy in federal lawsuits. Accordingly, the Governor seeks to join the Office of Attorney General and the Pennsylvania District Attorneys Association in requesting that this Court affirm the district court's well-reasoned decision finding that Pennsylvania's district attorneys enjoy Eleventh Amendment immunity when investigating or prosecuting criminal acts on behalf of the Commonwealth.

Thank you for your attention to this matter.

Sincerely yours,

/s/
Paul A. Tufano
GENERAL COUNSEL
Counsel for Thomas J. Ridge,
Governor
Commonwealth of Pennsylvania

cc: R. David Walk, Jr., Esquire
Robert W. Small, Esquire

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November 25, 1998

Via Hand Delivery

P. Douglas Sisk
Clerk of the Court of Appeals for
The Third Circuit
United States Courthouse
601 Market St., Room 21400
Philadelphia, PA 19106

RE: Raymond Carter v. City of Philadelphia, et al.
No. 97-1581

Dear Mr. Sisk,

I am writing to inform you that Appellee City of Philadelphia will not be filing a brief in the above-captioned

appeal. However, please inform the Court that, pursuant to F.R.A.P. 28 (i), the City fully joins in the position of Appellee Richard Roe, representing unknown employees of the Philadelphia District Attorney's Office, that Appellant Carter's claims against Roe, in his official capacity, are claims against an arm of the Commonwealth and are therefore banned by the Eleventh Amendment.

Thank you for your attention to this matter.

Sincerely,

/s/
Marcia Berman
Deputy City Solicitor

MB: pk
Cc: Robert W. Small, Esq.
R. David Walk, Jr., Esq.
Emily Zimmerman, Esq.
James A. Rocco, III, Esq.